Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

JERRY BAKER,

Petitioner,

v.

MERCEDES BENZ OF NORTH AMERICA AND DAIMLER BENZ AG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether expert evidence based on widely-accepted scientific principles, but which is incapable of empirical testing due to the facts of the case, must be excluded under Federal Rule of Evidence 702 because it cannot meet the "general observations" noted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), resulting in a conflict between the Fifth Circuit and the Ninth, Tenth and Eleventh Circuits.

There is a class of product liability claims where the total unavailability of the defective product makes the scientific evidence admissibility analysis outlined in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) inapplicable. For that class of claims, the question presented is:

2. Whether, in the absence of expert scientific evidence admissible under the considerations identified in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), a federal diversity products liability claim can proceed to the trier of fact on circumstantial evidence as allowed by underlying state law applicable under 28 U.S.C. § 1652.

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PETITION FOR A WRIT OF CERTIORARI

Jerry Baker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App., *infra*, 1-5) is noted as a decision without published opinion at 163 F.3d 1356 (5th Cir. 1998). The opinions of the district court (App., *infra*, 9-31) are unreported.

The prior opinion of the Fifth Circuit Court of Appeals in this case on an issue not presented here is reported as 114 F.3d 57 (5th Cir. 1997) (App., *infra*, 32-41). The opinions of the district court (App., *infra*, 42-47) are unreported.

JURISDICTION

The Fifth Circuit Court of Appeals denied the motion for rehearing on December 29, 1998 (App., *infra* 48). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Enabling Act, at 28 U.S.C. §§ 2071 and 2072, provides the Supreme Court with authority to prescribe the rules of procedure and evidence used in federal courts (App., *infra* 49-50).

The Rules of Decision Act, at 28 U.S.C. § 1652, provides that state laws, "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide," are the rules of decision in federal civil actions "in cases where they apply" (App., *infra* 50).

STATEMENT

Petitioner Jerry Baker and his former wife, Selma Washington Baker, sued Mercedes Benz of North America for breach of warranty, negligence and strict products liability in June 1993 in the United States District Court in and for the Southern District of Texas, Houston Division under the diversity jurisdiction allowed by 28 U.S.C. § 1332. They alleged that Jerry Baker was catastrophically injured when the 1985 Mercedes Benz 380E vehicle he was driving suddenly accelerated, did not respond to the application of the brake pedal, went out of control and did not stop until it crashed into a telephone pole. The petitioner is now an incomplete quadriplegic as a result of this accident. The vehicle, which was neither owned nor controlled by the petitioner, was damaged beyond repair and was transferred to a junk dealer who disposed of its front end, including the engine, accelerator and cruise control unit. These parts of the vehicle were unavailable for examination by either the petitioner's or respondents' experts as noted by the court of appeals (R.76; App., *infra* 2-3). The district court signed an order allowing the petitioner to amend his complaint to add respondent Daimler Benz AG and non-suit Petitioner's former wife in February 1994 (R.13; R.14).

The district court granted respondents' summary judgment initially on the negligence and breach of warranty claims, and then on the strict products liability claim based on lack of admissible evidence. The Fifth Circuit Court of Appeals affirmed, finding no abuse of discretion by the district court.

A. Exclusion of Expert Evidence

This case involves the applicability of the expert evidence admissibility factors outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to the testimony of an engineering expert when the unavailability of the product for testing has made those considerations impracticable. The admissibility of expert evidence has been governed by the relevance and reliability considerations listed in *Daubert*, as applied by the district courts, since 1993. The reliability of criteria include: "whether the theory or technique in question can be (and has been tested)", "whether the theory or technique has been subjected to peer review and publication", "the known or potential rate of error", and also "explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."[1] For that class of claims involving liability for a defective product, the inquiry involves an assessment of the reliability of the proffered scientific evidence by those factors.

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[1] *Daubert*, 509 U.S. at 593, 594.

Petitioner's response to respondents' motion for summary judgment included two separate filings which attached evidence by six different engineers on the defective product liability claim (R.25, R.30).[2] After the district court's initial denial of respondents' motion for summary judgment on the product liability claim (R.34, App., *infra* 23-31), the respondents filed a motion to exclude the testimony of one of petitioner's experts, citing to *Daubert* as the standard for its admissibility. The petitioner filed a response which included the expert's background and training in the field of engineering and the bases for his theory of the product defect based on electromagnetic interference (R.48). Citing to *Daubert* numerous times, the district court excluded the testimony for two reasons: first because of a lack of physical inspection and second because the engineering theory of electromagnetic interference, while "not 'novel science,' " in this case had not been presented in a form to survive scrutiny of "valid methodology" (R.53, App., *infra* 15). Based, in part, on the exclusion of the engineering defect expert, the district court granted summary judgment.

The Fifth Circuit Court of Appeals affirmed the district court's evidentiary ruling under the abuse of discretion standard of review outlined in *General Electric v. Joiner*, 522 U.S. ___, 118 S.Ct. 512, 517 (1997). The court of appeals found no abuse of discretion in the district court's grounds that the excluded engineering expert

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[2] Petitioner's responses to the motion for summary judgment included reports which were each signed by two professional engineers and also testimony by two of respondents' engineering experts.

opinion failed to demonstrate "a reliable basis in the knowledge, experience and methodology of his field of expertise" (R.76, App., *infra* 2). The district court's admissibility ruling was based on the *Daubert* considerations, which require the scientific method of trial and error empirical testing. In the field of engineering dealing with electromagnetic interference situations such testing is impracticable in general and impossible in this specific case because of the total unavailability of the defective product parts. As the court of appeals pointed out, neither the petitioner nor the respondents had the opportunity to inspect for the presence or lack of defects (R.76, App., *infra* 3).

The court of appeals cited directly to *Daubert* in finding that the expert's opinion "did not 'have a reliable basis in the knowledge and experience of his discipline' " (R.76; App., *infra* 4). This finding was based, in part, on the lack of testing done by the expert. The fact that the district court, the court of appeals and the respondents never argued that the scientific principle of electromagnetic interference was invalid should be noted. The exclusion was primarily based on the lack of testing on precisely the alleged defect in the car although both courts noted this was not possible in this case (R.76, App., *infra* 3; R.53, App., *infra* 11; R.34, App., *infra* 24). This case exemplifies the strict adherence to the entirety of the *Daubert* factors on admissibility for all scientific expert evidence proffered in the Fifth Circuit, regardless of practicable applicability, which is not in accord with holdings in other circuits, including the Ninth, Tenth, and Eleventh Circuits.

B. State Products Liability Burdens of Proof

Petitioner responded to respondents' motion for summary judgment with evidence which included a sworn statement by the petitioner who was the sole witness to the accident causing his injury (R.25, App., *infra* 51-52). Petitioner declared in his sworn statement that the car had failed to respond to his application of the brake when it had suddenly accelerated out of control. In addition, petitioner attached the corroborating report of one of his designated experts, Derek Nolen, without respondents' objection, which stated that numerous documents of similar incidents of unintended acceleration in similar vehicles had been reviewed and that the physical inspection of the rear of the car established that the brake pedal was depressed at the time of impact (R.25, App., *infra* 54). The report was also signed by another professional engineer, Roger L. Owens. (R.25, App., *infra* 55). Because the entire front portion of the car was unavailable, Nolen also stated that there was "insufficient physical evidence" for determination of the sudden acceleration despite the application of the brake (R.25, App., *infra* 54). The evidence attached to the response included documentation on Mercedes recalls related to unintended acceleration, a peer-reviewed presentation of sneak analysis related to electrical and electronic circuitry latent design defects, and also documented reports of similar sudden acceleration incidents with Mercedes vehicles, such as are appended here (R.25, *see, e.g.*, App., *infra* 86-103).

Petitioner also responded with deposition testimony from the respondents' designated expert, Axel Stehle, that the unexplained or sudden acceleration phenomenon

could be explained in severe accidents by driver error in depressing the gas pedal and not the brake pedal (R.25, App., *infra* 57). Respondents' expert Gary H. Bowne, who was designated as a person most knowledgeable about sudden acceleration problems in similar litigation in California, confirmed that driver error of pedal misapplication was the cause of sudden acceleration (R.25, App., *infra* 61). Using federal and state summary judgment standards which require all reasonable inferences to be resolved in favor of the nonmovant, petitioner thus effectively negated respondents' sole explanation of the sudden acceleration phenomenon which had caused his injuries with the evidence contained in Nolen's report as attached to the response. The circumstantial evidence led to no other conclusion but that the respondents' Mercedes Benz was defective.

Petitioner filed a supplement to his response which consisted of an abbreviated version of the expert evidence on electromagnetic interference (R.30). Based on petitioner's and respondents' filings, the district court granted partial summary judgment on the breach of warranty and negligence res ipsa loquitor claims, but denied summary judgment on the product liability claim (R.34, App., *infra* 31).

Respondents filed a motion for the district court to reconsider their motion for summary judgment. Petitioner's response noted that all of his expert testimony had been filed without objection by the respondents, effectively precluding a grant of summary judgment (R.44). Respondents then filed a motion to exclude the testimony of petitioner's expert on electromagnetic interference, James McCann. Petitioner's response included a

declaration by McCann detailing the bases for his opinions including: his engineering training and experience, experience in engineering investigation of over 1000 automobile accidents, electrical circuitry and mechanical defect investigations, nine professional affiliations, review of the literature which included extensive published reports of similar incidents with Mercedes vehicles, and the particular police report filed for this accident. (R.48, App., *infra* 67-85).

The district court heard arguments on the exclusion of McCann's testimony (R.72) and subsequently granted respondents' motion to exclude it and also granted summary judgment on the remaining products liability claim based on the exclusion of McCann's testimony, the inability of Nolen to determine that there was a sudden acceleration from the physical evidence available and the failure of the petitioner to testify on identity and cause of defect (R.53, App., *infra* 21-22).[3] The district court also dismissed the case law on circumstantial evidence cited by the petitioner as distinguishable on the facts and relied instead on a case in which the only evidence presented was the fact of the accident without considering the circumstantial evidence attached to petitioner's response (R. 53, App., *infra* 21).

The court of appeals affirmed the grant of summary judgment noting that because of a lack of physical evidence to confirm a defect, petitioner had not presented

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[3] This was based on lack of physical evidence because the entire front end of the car was missing; it could not be inspected or tested.

evidence to support a reasonable inference of an electromagnetic interference-related sudden acceleration resulting from a defective Mercedes product (R.76, App., *infra* 3-5). The court of appeals did not review the district court's rulings on the sufficiency of circumstantial evidence points of law raised by the petitioner's argument and evidence as required by *Salve Regina*,[4] but based its holding on the exclusion of McCann's testimony, the lack of physical evidence for a confirmed determination by Nolen and the inability of the petitioner to testify on the defect which caused his accident (R.76, App., *infra* 4-5). These holdings are contrary to the state substantive law on the availability of circumstantial evidence to meet the burden of proof of product defect on summary judgment and at trial, where the defective product is unavailable and the event would not have occurred unless there was a defect. That this type of evidence is allowed by underlying state substantive law, does not necessarily require expert testimony, and can readily be considered by an ordinarily prudent trier of fact was not reviewed or considered by the court of appeals in its opinion (R.76, App., *infra* 1-5). The availability of circumstantial evidence proofs, outside of presentation of expert testimony, is particularly relevant in state law which is grounded in due process and access to the courts by its citizens as guaranteed by the state Constitution. TEX. CONST., art. 1, § 13.[5]

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[4] *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

[5] See also, Petitioner's Petition for Rehearing filed with the Fifth Circuit Court of Appeals, pp. 5-6 (R.___).

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit in this case conflicts with decisions on the applicability of *Daubert* to all scientific evidence admissibility in the Ninth, Tenth and Eleventh Circuits. The conflict between the circuits causes an inequality of justice in the federal circuits, since claims are being precluded from consideration by American juries in some circuits and not others, based solely on the scientific expert admissibility rulings in the particular circuit. The assurance of uniformity in rulings in the federal circuits is an essential aspect of the Supreme Court's function and it should be addressed by the Court in this case.[6] Moreover, the decision below is contrary to the underlying applicable state substantive law and that error is an important issue which should be reviewed by this Court.

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[6] The importance of this issue was eloquently stated by the dissenting opinion in the precedential *en banc* Fifth Circuit case on admissibility of scientific evidence:

> . . . Even before the present *en banc* circuit opinion there was a clear and present need for the Supreme Court to clarify whether and, if so, how, Daubert applies to expert testimony based on knowledge derived by disciplines or sources other than the hard sciences.

Moore v. Ashland Chemical, Inc., et al., 151 F.3d 269, 279 (5th Cir. 1998) (Dennis, Parker, and Stewart, dissenting).

I. The Fifth Circuit Court of Appeals' Interpretation of the Applicability of the *Daubert* Factors to All Scientific Expert Evidence Conflicts with the Ninth, Tenth and Elventh Circuits and Causes Inequality of Justice in the Federal Circuits

This Court outlined the "general considerations" to guide federal district courts in admissibility rulings on scientific evidence presented in claims before them in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Since that opinion was published, the four *Daubert* reliability factors of "testability," "peer review," "rate of error," and "acceptance within that community" have generated an ever-increasing importance in federal court claims, with the exponential increase of scientific evidence available every year.

The guidance of this Court in *Daubert* on Rule 702 was "we emphasize, a flexible one."[7] In keeping with the liberal standard of relevance in Federal Rule of Evidence 401, the Court noted in *Daubert* that the "austere standard" of general acceptance as the exclusive test for admissibility under *Frye* was noticeably "absent from, and incompatible with, the Federal Rules of Evidence."[8] It is inconsistent to interpret the *Daubert* factors as an exclusive test on admissibility of scientific evidence when that opinion was a direct invalidation of a single austere standard on this issue as reflected in the Federal Rules of Evidence. The circuits do not uniformly apply all of the factors to all scientific evidence, nor should they under

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[7] *Daubert*, 509 U.S. at 594.

[8] *Id.* at 589.

the correct interpretation of *Daubert*.[9] The flexibility of the district courts in admissibility rulings was bolstered by this Court in setting the standard of review for those rulings at an "abuse of discretion" review in *General Electric v. Joiner*, 522 U.S. ___, 118 S.Ct. 512, 517 (1997).

The Fifth Circuit, in this case, and as detailed in its *en banc* opinion in *Moore v. Ashland Chemical, et al.*, 151 F.3d 269, 275 (5th Cir. 1998), strictly adheres to the *Daubert* factors for all scientific evidence. Citing to both *Daubert* and *Joiner* for their analysis, the court of appeals stated that Rule 104(a) required the district judge "to conduct preliminary fact finding."[10] Later in the opinion, the court of appeals used the *Daubert* factors as the framework within which the district court was entitled to conclude that the listed bases for the proffered expert opinion "were individually and collectively inadequate under *Daubert*."[11] As stated in a vigorous dissent by three of the

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[9] *Id.*

[10] *Moore*, 151 F.3d at 276. The court of appeals detailed the evidentiary admissibility burden as:

> Thus, the party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and therefore, are reliable. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted methodology is insufficient. . . . The proponent need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.

[11] *Id.* at 277.

Fifth Circuit Judges, the majority *en banc* opinion "conflicts with the view of other circuits, a state court of last resort, and scholarly commentary."[12] That case was decided on August 14, 1998, and the appeal on this case was decided by a panel of that circuit on November 18, 1998 with *Moore* as the standard on expert scientific evidence admissibility for the engineering testimony for which physical testing was an impossibility, as noted by both the circuit court and the district court (R.76, App., *infra* 3; R.53, App., *infra* 11; and R.34, App., *infra* 24). These holdings of the Fifth Circuit follow the rule used previously in the exclusion of engineering expert testimony based on the *Daubert* factors, *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997). The *Watkins* court held that "the nonexclusive list of factors relevant under *Daubert* . . . are also relevant to assessing other types of expert evidence."[13] The *Watkins* court noted that it could not agree with the Tenth Circuit's application of *Daubert*.[14]

The Tenth Circuit, in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996), a case involving admissibility of an engineering expert's testimony on defective design of a vehicle which caused injuries in a rollover accident, held that the four factors in *Daubert* did not apply to that evidence.[15] For that court, *Daubert* did not apply to the plaintiff's expert who reached his conclusions "by drawing upon general engineering principles

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[12] *Id.* at 279, (Dennis, Parker, and Stewart, dissenting).

[13] *Watkins*, 121 F.3d at 991.

[14] *Id.*

[15] *Compton*, 82 F.3d at 1519.

and his twenty-two years of experience as an automotive engineer."[16]

The Ninth Circuit, citing to *Compton*, has held that engineering expert testimony should not be held unreliable under *Daubert* analysis in *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997). That court held that the engineer's testimony was " 'facially helpful and relevant' and seemingly reliable," and was based on the expert's "experience as a mechanical engineer who has investigated hundreds of forklift accidents."[17] In this opinion, which reversed the district court's exclusion based on *Daubert* and subsequent grant of summary judgment, the court of appeals noted that *Daubert* did not completely change "our traditional analysis under Rule 702."[18]

The Eleventh Circuit, held that evidence proffered by an engineer, but based upon his experience and not scientific theory, could not be excluded under *Daubert* in *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997).[19] The district court excluded the testimony of the Carmichael's engineer because it did not satisfy any of the "four admissibility criteria outlined by the *Daubert* court" and granted summary judgment for Samyang.[20] In reversing the district court's exclusion of the testimony and grant of summary judgment based on that exclusion,

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[16] *Id.*

[17] *McKendall*, 122 F.3d at 807, 806.

[18] *Id.* at 807.

[19] *Cert. granted sub nom. Kumho Tire Co. v. Carmichael*, ___ U.S. ___, 118 S.Ct. 2339 (1998).

[20] *Carmichael*, 131 F.3d at 1434.

the court of appeals noted that the testimony by the engineer, based on his experience, "falls outside the scope of *Daubert*."[21] As held by the Eleventh Circuit, if the basis for the expert opinion is skill or experience-based observation, the fact that he is an engineer does not necessarily implicate the *Daubert* factors.[22]

The decisions by the courts of appeal noted above present a clear conflict between the rigid application of the *Daubert* factors to all expert scientific testimony, regardless of the facts in the case, by the Fifth Circuit and the flexible application of the entirety of the *Daubert* opinion by the Ninth, Tenth and Eleventh Circuits. As illustrated above, litigants in the Fifth Circuit are being precluded presentation of their claims to the trier of fact because of summary judgments granted on the basis of inadmissibility of their expert evidence under the *Daubert* factors. In contrast, litigants in the Ninth, Tenth, and Eleventh Circuits have been allowed to proceed with their claims, based on those circuits' flexible standard in applying the admissibility criteria outlined by this Court in *Daubert*. The result is an inequality of the administration of justice among the circuits which must be addressed by this Court.

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[21] *Id.* at 1436. The court cited to the holding of the Sixth Circuit in *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994) for the definition of a scientific expert as one who relies on the application of scientific principles, rather than skill or experienced-based observation for the basis of his opinion. *Id.*, 131 F.3d at 1435.

[22] *Id.*

II. The Decision of the Court of Appeals Is Contrary to Underlying Applicable State Law Under 28 U.S.C. § 1652

Under the Rules of Decision Act, 28 U.S.C. § 1652, in the absence of applicable federal statute on products liability claims, the substantive state law must be applied. Texas has followed the rule of strict product liability as expressed in the RESTATEMENT (SECOND) OF TORTS, § 402A since 1967.[23] Under that substantive law, the principal requirement for the imposition of strict liability is proof by the plaintiff that he was injured because of a defective condition in the product when it left the hands of the seller.[24] This does not require that proof be made by direct or opinion evidence; "it usually can only be made by circumstantial evidence."[25] Additionally, in

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[23] *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 548 (Tex. 1969) (citing to *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967)).

[24] *Id.*

[25] *Id.*, (citing to *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969)).

> This Court in the *McKisson* case extended the strict liability doctrine to products other than foodstuffs. To exclude circumstantial evidence that the product was defective at the time of the sale would frustrate the beneficial purposes of the doctrine. It would be equally difficult, if not impossible, for the plaintiff to rebut by direct evidence all of the conceivable possibilities which would account for the defective condition other than the existence of the defect at the time of the sale. Such direct evidence should not be required, particularly when dealing with a latent defect.

Darryl, 440 S.W.2d at 632.

Texas, if the plaintiff has no evidence of a specific defect in the design or manufacture of the product, he may offer evidence of its malfunction as circumstantial proof of the product's defect.[26] It is also well established in Texas that evidence of similar events is admissible.[27] Further, to exclude the admissible evidence of earlier events which occurred under reasonably similar but not necessarily identical circumstances would be error.[28] It should also be judicially noted by any court attempting to interpret the state substantive law in Texas that its law is grounded in a state constitutional principle that:

> . . . All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. 1, § 13.[29]

In Texas, the guarantee of a remedy by due course of law is a substantive right.[30]

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). To determine whether there are issues of material fact, the court consults the applicable substantive law to

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[26] *General Motors v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977).

[27] *Rush v. Bucyrus-Erie Co.*, 646 S.W.2d 298, 301 (Tex. App. – Tyler 1983, writ ref'd n.r.e.).

[28] *Missouri-Kansas-Texas Railroad Co. v. May*, 600 S.W.2d 755, 756 (Tex. 1980).

[29] See also, Petition for Rehearing of Jerry Baker, filed with the Fifth Circuit Court of Appeals, December 8, 1998, p. 6.

[30] *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984).

ascertain what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The standard of review on a district court's determination of state law is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The judge's function at the summary judgment stage is not to weigh the evidence himself and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251, 252. In considering a motion on summary judgment, the nonmovant's evidence is to be believed and all justifiable inferences are to be drawn in his favor. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992).

Petitioner filed a response to respondents' motion for summary judgment which included as attached exhibits: an excerpt from deposition testimony of respondents' engineering expert, Gary H. Bowne; an excerpt from deposition testimony of respondents' engineering expert, Axel Stehle; the report to petitioner from his engineering expert Derek T. Nolen, also signed by engineer Roger L. Owens; documentation of Mercedes-Benz of North America recalls related to throttle and unintended accelerated defects; a *Los Angeles Times* article related to the sudden acceleration problem and electronic interference; text of a professional engineering seminar presentation on "Sneak Analysis"; documentation of sudden acceleration incidents reported to NHTSA on Mercedes-Benz vehicles from the National Highway Traffic Safety Administration

(NHTSA); thirty-four letters or reports of sudden acceleration incidents involving respondents' vehicles which were sent to state and federal agencies; a NHTSA petition file index document; a NHTSA report on Mercedes-Benz sudden accelerations "EA88-034"; a NHTSA report on Mercedes-Benz sudden accelerations "EA88-003"; and a sworn affidavit by the petitioner on the incident (R.25, some at App., *infra* 51-66; 86-103). In addition, petitioner timely supplemented his response with a separate filing which included a declaration, under penalty of perjury, by engineering expert James P. McCann (R.30). This declaration was filed together with an engineering report which was signed and sealed by both James P. McCann and D.C. Keeler as professional engineers (R.30).

It should be noted that since the crucial portion of the defective product was unavailable to either the petitioner or respondents' experts, the circumstantial evidence noted above assumed a heightened importance in the case. The court of appeals, with reference to the missing portions of the vehicle, had noted that the "absence of evidence is vital to the motions of Mercedes (R.64, App., *infra* 33). In this case, direct physical proof of the specific defect was unavailable to *both* sides.

In responding to the respondents' motion, petitioner had submitted circumstantial evidence on five points of fact to prove evidence of a defect and that the defect caused his injuries. First, he provided his sworn statement, which had to be taken as true and established that the car suddenly accelerated and did not respond to his application of the brake pedal. Second, without objection from the respondents, he provided expert testimony that corroborated his statement that he had depressed the

brake pedal before the impact. Third, this expert report establishing the application of the brake pedal at the time of impact effectively negated the cause attributed by respondents' experts. Fourth, he provided deposition testimony from respondents' experts which identified driver error in pedal application as their explanation for instances of sudden acceleration; this was necessarily negated by petitioner's points number one, two and three, above. Fifth, he provided documentation to establish a pattern of similar events with a similar product. All of these points of evidence, taken as favorable to the petitioner, and applying the underlying state substantive law at issue as outlined above, necessarily met his burden of proving defect and causation even without the expert testimony which was excluded by the district court. The only other evidentiary issue to be proven by the petitioner under applicable state substantive law in a strict products liability claim is his injury. As a healthy person before the accident and an incomplete quadriplegic after the accident, his injury speaks for itself.

In considering respondents' motion for summary judgment on petitioner's product liability claims, the district court referenced its prior opinion for a statement on the standards for the motion. (R.54, App., *infra* 16). The district court noted that because of the exclusion of McCann's testimony, petitioner "can produce no evidence of either" the defective condition or the causal connection between the defect and his injuries (R.54, App., *infra* 17). The court also excluded the testimony of Bowne because evidence of problems on similar cars is "not evidence" of defect in petitioner's car and because the speed at which petitioner was traveling did not coincide with the speed

in the defect noted (R.54, App., *infra* 18). The district court noted that petitioner had no direct evidence of a defect but held that cases cited by petitioner were distinguishable, and thus "the use of circumstantial evidence cannot be applied in this case," (R.54, App., *infra* 21). Instead, the district relied on a "writ denied" state case in which the *only* evidence presented was the statement of the plaintiff. (R.54, App., *infra* 21).

The court of appeals erred in not reviewing the district court's grant of summary judgment under the *de novo* standard and in relying on only the conclusions of the district court on the limited evidence it considered (R.76, App., *infra* 4-5). The court of appeals failed to discuss the entirety of the circumstantial evidence presented without objection by the respondents and which had to be resolved in favor of the petitioner. In addition, the court of appeals made no review of the interpretation of state substantive law by the district court, certainly not the *de novo* standard required by this Court in *Salve Regina College v. Russell*, 499 U.S. at 231 and erred in not applying the relevant substantive state law on the issues as presented in the facts and evidence available in the case. Its error should be noted and reversed by this Court.

III. The Questions Presented Are Important

Chief Justice Rehnquist noted in his dissent in *Daubert* that the "general observations" made by the Court suffered a flaw:

> " . . . they are not applied to deciding whether particular testimony was or was not admissible,

> and therefore they tend to be not only general, but vague and abstract."

Daubert, 509 U.S. at 598 (Rehnquist, CJ, dissenting) (Stevens, J. joins; concurring in part and dissenting in part).

It is precisely the qualities identified by the Chief Justice in the *Daubert* "considerations" that have engendered the differing standards on admissibility. These differing standards have resulted not only in conflicting holdings by the circuits, but more importantly in denial of judicial redress for injuries to those in some circuits, but not in all circuits. The result is either more or less access to the trier of fact, depending on the circuit. This Court should address this inequality.

Among the briefs filed by amici in a similar case before the Court, *Kumho Tire Company, Ltd., et al. v. Carmichael, et al.*, there is one which is extraordinarily central to the issue presented here: differing standards on exclusion of expert testimony which necessarily leads to a grant of summary judgment and denial of access to the American jury system. Reference is made to the Amici Curiae Brief of Neil Vidmar, et al., in support of Respondents. The exclusionary rulings by the courts based on the inability of juries to make competent findings on the evidence presented is not supported by the body of empirical research conducted and published in peer-reviewed journals.[31] These rulings also run against the "liberal thrust" of the Federal Rules of Evidence and the

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[31] Amicus Brief in *Kuhmo Tire Company, Ltd., et al. v. Carmichael, et al.*, 1997 U.S. Briefs 1709, Neil Vidmar, et al. (LEXIS).

basic American judicial belief in the validity of our jury system. In the instant case, the excluded testimony concerned electromagnetic interference which is noted by every passenger prior to take-off on every flight in this country. McCann's theory would have met the *Frye* test of general acceptance if it had been applied.

Additionally, clear error in federal court application of state substantive law should be addressed by this Court. It is, after all, the reasoning outlined by the Court in holding in *Salve Regina* that the standard of review for interpretation of state substantive law is de novo. This is particularly the case when federal judicial action implicates the abridgment of a right protected by the state constitution. Summary judgment rulings are in effect a denial of access to the American jury system and should be carefully reviewed.

In sum, the circuits are in conflict on a matter of importance to the courts, to federal court litigants across the country and to the equality of justice in all the federal circuits. Also, the particular evidentiary issues of product liability claimants incapable of producing the physical evidence due to the facts of the case should be addressed by this Court. The Court should grant this petition.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

March 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-20723

JERRY BAKER; SALMA WASHINGTON BAKER,

Plaintiffs,

JERRY BAKER,

VERSUS

MERCEDES BENZ OF NORTH AMERICA;
DAIMLER BENZ AG,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(H-93-CV-1761)

(Filed Nov. 18, 1998)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

Jerry Baker brought this products liability action against Mercedes Benz of North America and Daimler Benz AG for damages, alleging that a defective automobile manufactured and distributed by the defendants

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R.

caused him severe injuries. The defendants successfully moved for the exclusion of Baker's expert witness's testimony and for summary judgment dismissing Baker's suit. Upon Baker's first appeal, the district court's judgment was vacated and the case was remanded without expression as to the merits for the entry of a separate document judgment. *Baker v. Mercedes Benz of North America*, 114 F.3d 57 (5th Cir. 1997). This second appeal by Baker puts at issue the merits of the evidentiary ruling and the summary judgment. We affirm. The district court did not abuse its discretion in excluding the testimony of Baker's expert on the grounds that Baker failed to demonstrate that the expert's opinion would have a reliable basis in the knowledge, experience and methodology of his field of expertise. The summary judgment was properly granted because Baker failed to establish a factual basis from which a reasonable trier of fact could find that his injuries probably were caused by a defect or unreasonably dangerous condition in the defendants' motor vehicle product that existed when it left their hands.

Baker sustained severe injuries in a single car accident that occurred when the 1985 Mercedes Benz 380 SE he was driving accelerated rapidly on its own, causing the vehicle to run off the road and into a utility pole. Baker testified in his deposition that he had done nothing to make the car accelerate, that he could not stop the car by applying its brakes, and that he did not know what had caused the car's abrupt, rapid acceleration. Baker had borrowed the car from a friend to go to a store by himself to buy cigarettes. The wrecked vehicle apparently was transferred to a junk dealer who disposed of its front end containing its engine, accelerator and cruise control

unit. Because the front end of the Mercedes 380 SE was not available, neither Baker nor the Mercedes defendants had an opportunity to inspect that part of the automobile for defects.

Nevertheless, Baker proffered the testimony of an expert engineer who expressed his opinion that the sudden acceleration of the automobile had been caused by an electromagnetic interference (EMI) disturbance which affected the car's fuel injection or cruise control system. The expert had a B.S. in mechanical engineering from Purdue University and was a registered professional engineer in several states. He had not received any formal advanced training in the fields of electrical or mechanical engineering. The expert testified that he had studied approximately twenty five sudden acceleration cases, about half of which he concluded were caused by EMI with cruise controls. He evidently had not been allowed to testify regarding his studies by any court.

The expert had not been able to test his explanatory theory of EMI-related rapid automobile acceleration due to the lack of substantial funding that such tests would require. He cited tests by the National Highway Traffic and Safety Administration and the Canadian government. He admitted, however, that neither of these studies had duplicated the "fully opened throttle" relationship with EMI that is essential to his own explanatory theory.

The expert had not inspected the pertinent parts of the car involved in the accident or tested any similar vehicle for EMI-related acceleration. He had not attempted to detect EMI at the site of the accident or internally initiated EMI in a car similar to the one

involved in Baker's accident. The expert's opinion and proposed testimony were based on Baker's testimony, the expert's knowledge of fuel injection and cruise control systems, and eight articles dating between 1964 and 1988 that described EMI tests with receivers that did not include either fuel injection or cruise control devices.

Under these circumstances, the expert's opinion that Baker's accident had been caused by an electromagnetic interference with the fuel injection and cruise control systems of the automobile did not "have a reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). Accordingly, the district court did not abuse its discretion in excluding the expert's opinion. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997).

We further conclude that the district court did not err in granting summary judgment in favor of the Mercedes defendants. As the district court observed:

> Baker himself has only provided testimony that the car "suddenly took off . . . It did not slow or stop until I crashed into a pole." Baker's only remaining expert, while suggesting that the brake lights were illuminated when the accident occurred, also noted that "insufficient physical evidence exists to confirm that an unintentional acceleration occurred . . . " In other words, [the expert] cannot even confirm that the car suffered "sudden acceleration," much less that such a phenomenon was caused by a defect.
>
> Baker attempts to introduce deposition testimony of one of Mercedes' experts to show that there was a defect in the car Baker was driving. According to the testimony of Gary Browne [in a

> different case], there have been cases in which the throttle linkage in cars similar to the one driven by Baker were stuck. According to this testimony, a car moving between 40 to 50 miles per hour could suffer from a stuck throttle, and the operator would have difficulty slowing down the car. In other words, although the problem may seem similar to the one of which Baker complains, it does not involve sudden acceleration.

Doc. 53, p. 8-9 (citations and footnotes omitted).

Consequently, a reasonable inference cannot be drawn from the summary judgment evidence of record that Baker's accident more likely than not was caused by an EMI-related abrupt, rapid self-acceleration of the Mercedes 310 SE which resulted from a defect or unreasonably dangerous condition in the automobile that existed at the time it left the Mercedes defendants' hands.

For the reasons assigned, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20723

D.C. Docket No. H-93-CV-1761

JERRY BAKER; SALMA WASHINGTON BAKER

Plaintiffs

JERRY BAKER

Plaintiff-Appellant

v.

MERCEDES BENZ OF NORTH AMERICA; DAIMLER BENZ AG

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

(Filed Nov. 18, 1998)

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JAN. 6, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER, Plaintiff, v. MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ AG, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-93-1761

ORDER

Pending before the Court is Plaintiff's Motion for New Trial (Docket #67). After carefully considering the motion, response, and the applicable law, the Court finds that it should be DENIED.

SO ORDERED.

Signed this 24th day of July, 1997.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-93-1761
	§	
MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ AG,	§	
	§	
	§	
	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the May 21, 1997 decision of the United States Court of Appeals for the Fifth Circuit, and for the reasons stated in this Court's orders granting summary judgment in favor of Defendants (Docket #34 and #53), it is ORDERED that Plaintiff take nothing and that this action be DISMISSED with prejudice.

This is a FINAL JUDGMENT.

Signed this 17th day of June, 1997.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-93-1761
MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ, AG,	§	
Defendants.	§	

MEMORANDUM OPINION and ORDER

Pending before the Court are the Motion for Reconsideration on Defendants' Motion for Summary Judgment and the Motion to Exclude Testimony of Plaintiff's Expert (Docket ##39 & 47) filed by Defendants Mercedes Benz of North America, Inc. and Daimler Benz AG (together, "Mercedes"). After considering the motions, the responses of Plaintiff Jerry Baker ("Baker"), the entire record and the applicable law, the Court is of the opinion that the motions should be GRANTED.

I.

Background

Baker filed this diversity suit against Mercedes following a one-vehicle accident in which the Mercedes Benz Baker was driving crashed into a utility pole. Baker claims that the car suddenly accelerated, and that the sudden acceleration caused the car to go out of control.

Baker suffered severe injuries in the accident, and is now an incomplete quadriplegic.

Baker based his complaint on three theories of liability, but this Court granted partial summary judgment, leaving only his claim based upon products liability. In his response to Mercedes' initial Motion for Summary Judgment, Baker argued that Texas law permits circumstantial evidence to be used as proof of a design defect in products liability cases. Mercedes initially did not respond to this argument, but has moved for this Court to reconsider, arguing that Baker's circumstantial evidence does not constitute evidence of a defect. Mercedes has since filed a motion to exclude the testimony of Baker's expert witness James P. McCann ("McCann"), arguing that McCann is not qualified to provide an opinion in this case, and that his opinion is not admissible under FED. R. EVID. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

II.

Motion to Exclude Testimony of Plaintiff's Expert

Baker has designated James P. McCann as an expert who will testify in this case. According to his expert report, McCann's opinion is that the car Baker was driving "suffered an electrical or mechanical failure causing a rapid acceleration," and that "this failure was . . . related to the cruise control unit and EMI." EMI refers to Electromagnetic Interference, a phenomenon described by McCann as causing intermittent failures in various electronic and mechanical components in cars.

McCann holds a Bachelor of Science in Mechanical Engineering from Purdue University, and is a registered Professional Engineer in several states. However, he has received no formal advanced training in the fields of electrical or mechanical engineering. Although he claims to have studied approximately twenty five sudden acceleration cases, of which about half involved EMI and cruise controls, there is no evidence in the record that he has previously been allowed to testify in court regarding these studies.[1] The record does not show any scholarly or technical publications authored by McCann that have been subjected to peer review.

It is McCann's theory that (a) the cruise control or fuel injection systems on the car Baker was driving malfunctioned, (b) this malfunction was caused by EMI, and (c) this malfunction was the cause of the accident. McCann did not examine the cruise control or fuel injection systems on the car Baker was driving.[2] In fact, it does not appear that McCann has examined these systems on *any* Mercedes-Benz vehicle. Furthermore, he has conducted no testing of EMI levels at the site of the accident.

The design and manufacture of automobiles are not subjects with which ordinary citizens are customarily knowledgeable and familiar. Therefore, defective product cases of this variety cannot reach the jury unless the

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[1] It appears, however, that McCann's testimony has been *excluded* in a similar case. *Hills Stores, et al. v. Recometa, et al.*, Grant Superior Court of Indiana, No. 27 DO2-9406-CP-133.

[2] The entire front section of the car including the engine was removed and sold to a third party, making the components at issue unavailable for inspection by any party.

defect claim is supported by qualified expert testimony. *Selig v. BMW of N. Am., Inc.*, 832 S.W.2d 95, 99-100 (Tex. App. – Houston [14th Dist.] 1992, no writ); *Hernandez v. Nissan Motor Corp.*, 740 S.W.2d 894, 895 (Tex. App. – El Paso 1987, writ denied); *see also Sanders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

Of course, Plaintiff has introduced testimony by an individual identified as an expert. However, it is for the Court to decide whether the expert's opinion is admissible. FED. R. EVID. 702; *Daubert*, ___ U.S. at ___, 113 S. Ct. at 2795-99; *see also In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("Stated more directly, the trial judge ought to insist that a proferred expert bring to the jury more than the lawyers can offer in argument. Indeed, the premise of receiving expert testimony is that it "will assist the trier of fact to understand the evidence or to determine a fact in issue. Fed.R.Evid. Rule 702"); *E.I. Du Pont De Nemours & Co. v. Robinson*, 38 Tex. Sup. Ct. J. 852, 856-58 (June 15, 1995) (adopting *Daubert* analysis for trials in Texas courts).

According to *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, ___ U.S. at ___, 113 S. Ct. at 2795. In order to qualify as "scientific knowledge," an inference or assertion "must be derived by the scientific method," and be "supported by appropriate validation." *Id.* However, the engineering opinion in question may also arguably fall within the scope of "technical, or otherwise specialized knowledge" under Rule 702. *See id.*, ___ U.S. at ___, 113 S. Ct. at 2795 & n.8. Nevertheless, the opinion must qualify as "knowledge" to satisfy the rule. *Id.; In re Air Crash Disaster*, 795 F.2d at

1233. The word " 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to ideas inferred from such facts or accepted as truths on good grounds.' " *Daubert*, ___ U.S. at ___, 113 S. Ct. at 2795 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986)).

Faced with a proffer of expert testimony, the Court must engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can properly be applied to the facts in issue." *Daubert*, ___ U.S. at ___, 113 S. Ct. at 2796. As engineering generally entails the practical application of scientific methods and measurements, this test is equally applicable in the present context. Ordinarily, "a key question to be answered in determining whether a theory or technique is [valid] will be whether it can be (and has been) tested." *Id.*

As presented to this Court, McCann's opinions and methodology are untested and, as to the car Baker was driving, untestable. First, McCann has testified that he cannot test the theory he proposes without substantial funding.[3] He admits that he is aware of only two tests of this theory, one by the National Highway Traffic and Safety Administration (NHTSA) and the other by the Canadian government. Transcript at 103-104. Neither of

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[3] Transcript of McCann's Testimony in *Recometa*, pp. 102-103 (hereinafter "transcript"). The parties have stipulated to the use of McCann's deposition and trial testimony in *Recometa*, and that McCann has done no EMI testing beyond that discussed in *Recometa*.

these studies were able to duplicate the "fully opened throttle" resulting from EMI that is the crux of McCann's theory. Thus, not only has McCann failed to conduct any tests, but independent tests which have been conducted fail to support his theory.

Further, there is a failure to collect any date in this case. As noted above, McCann has not even seen the relevant parts of the car driven by Baker. In fact, there is no indication that he has tested or measured *any* similar vehicle for susceptibility to EMI. McCann has never taken readings of EMI at or near the site of the accident, nor has he taken readings of EMI generated internally by cars similar to that driven by Baker.

McCann's conclusions are based upon (1) his understanding of the events surrounding the collision, which is based entirely upon Baker's testimony; (2) eight articles describing EMI and its effects, dating between 1964 and 1988;[4] and (3) his understanding of the functioning of fuel injection and cruise control systems. Essentially, McCann opines that because Baker states that the car suddenly accelerated, it must have. And because it suddenly accelerated, it must have been caused by EMI.[5] Although

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[4] McCann states that the 1988 article detailed the very problem addressed by his opinion. However, the receivers tested, which were chosen because they were "most susceptible to transients," did not include either fuel injection or cruise control devices. *See* exhibit 8 to Pltf's Resp. to the Motion to Exclude at 406-07.

[5] Baker also points to Derek T. Nolen's expert report, stating that it "negates" driver error, an alternative theory to unintended sudden acceleration. Nolen's conclusion is that the brake pedal was depressed at the time of the collision; it says

McCann makes the conclusory assertion that "[t]he methods [he] used to formulate the opinions . . . are scientifically valid," he does not explain the chain of reasoning that links the EMI he has not measured to the failure in the fuel injectors or cruise control he has not tested. And without any explanation of his reasoning, the validity of his methodology cannot be tested. If a methodology cannot be tested by an objective means, then it is incapable of meeting the "validity" criterion of *Daubert* because it can never be subjected to the scrutiny that any "valid" methodology must survive. *Daubert*, ___ U.S. at ___, 113 S.Ct at 2796-97.

Baker cites *Lappe v. American Honda Motor Co.*, 857 F.Supp. 222 (N.D.N.Y. 1994) for the proposition that *Daubert* should only be applied to "expert testimony approaching the outer boundaries of traditional scientific and technical knowledge." *Id.* at 228. Baker reasons that because EMI is not novel science, *Daubert* should not prevent McCann from testifying. Baker's reliance on *Lappe* fails for two reasons.

First, *Lappe* is distinguishable from the case before this Court. The expert in *Lappe* had far more qualifications than McCann; he held a Ph.D. in Biomedical Engineering, and was a Professor in the Department of Material Science and Engineering at the State University of New York at Stony Brook. More importantly, however, the expert inspected the accident vehicle, comparable Honda automobiles, and the accident site, none of which

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nothing about what *caused* the collision. In fact, Nolen's report indicates that "insufficient physical evidence exists to confirm that an unintentional acceleration occurred . . . "

McCann has done. The defendants in *Lappe* complained that the expert did not take appropriate measurements in performing his inspection and analysis; McCann never performed an inspection in the first place.

Second, while it may be true that EMI is not "novel science," Baker has not shown a single scientific study linking EMI to failures in the components at issue in this case. The theory that EMI causes malfunctions in fuel injector or cruise control systems, which in turn causes unintended sudden acceleration, has simply not been presented in a form which can be subjected to the scrutiny that any valid methodology must survive. *Daubert*, ___ U.S. at ___, 113 S.Ct. at 2796-97. Thus, even if EMI is not novel science, the theory McCann espouses "approach[es] the outer boundaries of traditional . . . technological knowledge." *Lappe*, 857 F.Supp. at 228.

Baker has failed to support McCann's proposed testimony by any appropriate validation based on good grounds that are known. *See Id.*, ___ U.S. at ___, 113 S.Ct. at 2795. Because Baker has failed to meet this standard of evidentiary reliability, McCann may not testify at the trial of this cause. Therefore, Mercedes' Motion to Exclude Testimony of Plaintiff's Expert Witness James P. McCann is GRANTED.

III.

Motion for Summary Judgment

The summary judgment standard of this Court must apply has been fully discussed in the Court's initial order granting partial summary judgment (Docket #34). In that order, the Court declined to rule upon Mercedes' motion

as it related to products liability, because Mercedes failed to respond to Baker's argument based upon circumstantial evidence.

Texas has adopted the theory of strict products liability expressed in section 402A of the Restatement (Second) of Torts. *Caterpillar, Inc. v. Shears*, 38 Tex. Sup. Ct. J. 979, 980 (June 29, 1995).[6] To recover under a theory of strict liability, a plaintiff must prove (1) the defective and unreasonably dangerous condition of the defendant's product and (2) a causal connection between the condition and the plaintiff's injuries or damages. *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372, 377 (Tex.1984), *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 610 (Tex. App. – Corpus Christi 1994, writ denied). In light of the fact that the testimony of McCann has been excluded, Baker can produce no evidence of either of these elements. Baker himself has only provided testimony that the car "suddenly took off . . . It did not slow or stop until I crashed into a pole." Baker aff. at 1, attached to Plaintiff's Response to Motion for Summary Judgment. Baker's only remaining expert, while suggesting that the brake lights were illuminated when the accident occurred, also noted that "insufficient physical evidence exists to confirm that an unintentional acceleration occurred . . . " Report of Derek Nolen at 2, attached to Plaintiff's Response to Motion for

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[6] The rule stated in § 402A "applies only where the product is, *at the time it leaves the seller's hands*, in a condition not contemplated by the ultimate consumer . . . " RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (emphasis added). Baker has not presented even circumstantial evidence that the six-year old car he had borrowed from a friend was in the same condition as when it left the seller's hands.

Summary Judgment. In other words, Nolen cannot even confirm that the car suffered "sudden acceleration," much less that such a phenomenon was caused by a defect.

Baker attempts to introduce deposition testimony of one of Mercedes' experts to show that there was a defect in the car Baker was driving. According to the testimony of Gary Bowne,[7] there have been cases in which the throttle linkage in cars similar to the one driven by Baker were stuck. According to this testimony, a car moving between 40 to 50 miles per hour could suffer from a stuck throttle, and the operator would have difficulty slowing down the car. In other words, although the problem may seem similar to the one of which Baker complains, it does not involve sudden acceleration.

Baker's reliance on this testimony fails for two reasons. First, the fact that there have been problems on similar cars is not evidence that there was a defect in the car driven by Baker. Second, the problem described by Bowne is not the one complained of by Baker. The problem Bowne describes, which occurs when a car is travelling between 40 to 50 miles per hour, cannot have affected the car Baker was driving at a rate of 35 miles per hour. *See* Baker aff. at 2.

Because he has no direct evidence of a defect, Baker argues that "it has long been the case that circumstantial

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[7] Bowne's deposition testimony was given in a different case.

evidence can show a defective product." The circumstantial evidence upon which Baker relies is (1) Baker's testimony that the car suddenly accelerated; (2) Nolen's report that the brake pedal was depressed when the collision occurred; and (3) Bowne's testimony regarding throttle linkage problems.[8] Baker relies on Texas cases holding that circumstantial evidence is admissible to prove that a product is defective.[9] These cases are distinguishable from the case before the Court.

The plaintiff in *Hopkins* claimed that a defective carburetor caused him to lose control of the speed at which his pickup truck was travelling. *Hopkins*, 548 S.W.2d at 346. The jury found that the plaintiff, in replacing and then re-installing the carburetor, had misused the product. *Id.* at 348. The trial court disregarded the finding, in part because it was "immaterial to the establishment of any defense." *Id.* In addressing this issue, the Supreme Court stated in dictum that circumstantial evidence of the product's malfunction could be used to show the condition of the product when it left the hands of the defendant. *Id.* at 349-50. The Supreme Court affirmed the trial court's decision to disregard the finding, rejecting misuse as a defense where a product was defective, and instead adopting a comparative responsibility scheme where the

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[8] Response to Motion for Summary Judgment, Docket #25, at 5-6.

[9] *See General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349-50 (Tex. 1977), *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 548 (Tex. 1969), and *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 632 (Tex. 1969).

defective product and its misuse were contributing causes. *Id.* at 351.

In *Hopkins*, the circumstantial evidence of the defect was allowed to be considered along with direct evidence of the carburetor itself. Furthermore, the court stated that "[n]o explanation [was] given which would permit common experience or knowledge apart from expert testimony to determine the reason for the malfunction of the carburetor. The jury and court must therefore depend upon the explanations and opinions of the experts." *Id.* at 348. In the case before this Court, Baker can bring forth neither direct evidence nor expert testimony regarding the defect to be considered along with any circumstantial evidence he may offer.

Baker's reliance on *Darryl* is also misplaced. The circumstantial evidence in that case related to whether the defect existed at the time the truck left the manufacturer. *Ford Motor Co. v. Darryl*, 432 S.W.2d 569, 572 (Tex. Civ. App. – Amarillo 1968), *rev'd*, 440 S.W.2d 630 (Tex. 1969). The parties had stipulated that the brakes on the truck were inoperative after the accident *because of* a bent push rod, the component alleged to be defective. *Id.* Furthermore, as in *Hopkins*, the jury had the benefit of expert testimony in making their decision. *Id.*

Baker also relies on *Ponder* and *Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1175 (5th Cir. 1986). However, those are cases in which the accident itself is substantial circumstantial evidence of a defect, because the products acted in a way neither predicted nor intended by any user: In *Ponder*, a bottle of Coca-Cola exploded, and in *Ayres*, a television set caught fire. In this case, Baker

claims the car suddenly accelerated. Cars are supposed to accelerate when the gas pedal is pushed. Baker suggests that the car acted in a way it should, but claims the impetus for the action was incorrect. Coca-Cola bottles are not built for the purpose of exploding, and televisions are not built for the purpose of starting fires. Thus, the failure of the products in *Ponder* and *Ayres* are distinguishable from the present case; the use of circumstantial evidence cannot be applied to this case.

This case is closer on its facts to *Hernandez v. Nissan Motor Corp. U.S.A.*, 740 S.W.2d 894 (Tex. App. – El Paso 1987, writ denied). In that case, the only witness to the accident was the plaintiff, who could not say what was wrong with the car. *Id.* at 895. No expert witness was presented on the defect issue. *Id.* The court held that the mere fact that an accident occurred is not sufficient proof that an automobile is defective. *Id.* In this case, Baker was the only witness to the accident, and he could not say what was wrong with the car.[10] In light of this Court's ruling excluding McCann, he has only designated one expert who will testify, and that expert cannot testify that there was a defect.[11]

Baker has brought forward no evidence of a defective and unreasonably dangerous condition of Mercedes' product. *See Lucas*, 696 S.W.2d at 377.[12] Because of the

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[10] "Q: Okay. Do you have any idea at all what was wrong with the Mercedes, if anything?

A: I sure didn't. Q: Do you know now? A: No." Baker depo. at 62, exh. B to Motion for Summary Judgment.

[11] Report of Derek Nolen at 2, attached to Plaintiff's Response to Motion for Summary Judgment.

[12] In light of this Court's ruling excluding McCann from

absence of any evidence supporting Baker's claim of a defect, summary judgment is appropriate. *See Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

IV.

Conclusion

Baker has not demonstrated that the expert testimony of James P. McCann meets the standard of admissibility under *Daubert*. This Court therefore ORDERS that McCann may not testify at trial. Furthermore, on the admissible evidence presented, Baker has not raised a genuine issue of material fact regarding whether a defect existed in the Mercedes he was driving. Therefore, Mercedes is entitled to judgment as a matter of law. For these reasons, Mercedes motions to exclude expert testimony and for summary judgment are GRANTED.

So ORDERED.

This is a FINAL JUDGMENT.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 25th day of October, 1995.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

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testifying, it is inconceivable on this record that Baker would be able to show causation. However, this failure was not presented by Mercedes, and is therefore not addressed in this order.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER, Plaintiff, vs. MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ AG, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-93-1761

MEMORANDUM OPINION

Pending before the Court is Defendants' Motion for Summary Judgment (Docket #22). The Court has considered the motion, the response and the applicable law and is of the opinion that the motion should be GRANTED IN PART and DENIED IN PART as follows.

I. BACKGROUND

Plaintiff Jerry Baker filed suit against Defendants Mercedes Benz of North America and Daimler Benz AG following a one-vehicle accident in which the Mercedes Benz Plaintiff was driving crashed into a television pole. Plaintiff claims that the car suddenly accelerated, and that the sudden acceleration caused the car to go out of control. He bases his complaint on three theories of liability: a products/strict liability claim; a breach of warranty claim, in which Plaintiff claims breaches of both an express warranty and an implied warranty of merchantability and fitness for use for ordinary purposes; and a

res ipsa loquitur theory of negligence. Plaintiff did not allege that he gave Defendants any notice of a breach of warranty prior to filing suit.

Defendants have answered and asserted affirmative defenses. Defendants then filed a motion for summary judgment claiming that

> Plaintiff as a matter of law is unable to demonstrate that any defect in the vehicle existed or that any such defect caused the accident or injuries. After the accident, neither plaintiff nor his attorney took appropriate steps to preserve the car, and the entire front part of the car including the engine was removed and sold to an unknown third party . . .
>
> As plaintiff's own expert admits, there is insufficient evidence to show that an unintentional acceleration occurred. Certainly, plaintiff can come forward with no evidence to show that such an acceleration, even if it did occur, was the result of any defect in the car or that such a defect caused the accident . . .

Defendants' motion does not address the elements of each cause of action, but instead focuses on the lack of physical evidence available to show a defect in the Mercedes in question. As Defendants note, Plaintiff's own expert stated that there was insufficient physical evidence to show a defect. Defendants also argue that they are entitled to summary judgment on Plaintiff's claims because there is a failure of proof on whether an express warranty or implied warranty existed, and whether Defendants were negligent. Defendants further claim that there is a failure of proof on whether any defect, breach

of warranty, or act of negligence which may have existed was the cause of Plaintiff's injury.

In his response to Defendants' motion, Plaintiff argues that Texas law permits circumstantial evidence to be used as proof of a design defect in products liability cases. Plaintiff has not offered proof of any express warranty upon which he may have relied, nor has he offered any proof to rebut Defendants' assertion that no proof exists of an express or an implied warranty or of negligence on the part of Defendants. Defendants have not responded to Plaintiff's argument that Texas law allows a plaintiff to prove a products liability case with circumstantial, as opposed to direct, evidence.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c). To determine whether there are issues of material fact, the court consults the applicable substantive law to ascertain what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court then reviews the evidence, viewing the facts and inferences in the light most favorable to the nonmoving party. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990), *cert. denied*, ___ U.S. ___, 114 S.Ct. 171, 126 L.Ed.2d 131 (1993).

Rule 56(c) places the initial burden on the moving party to inform the court of the basis for its motion and to identify those portions of the record which it believes

demonstrate the absence of a genuine issue for trial. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). To satisfy this burden, the moving party may either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim.

If the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party need only point out that the record contains insufficient proof of an essential element of the nonmoving party's claim or defense. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). In the absence of any proof, the Court does not assume that the nonmoving party could or would prove the necessary facts. *Little v. Liquid Air Corp.*, 37 F.3d at 1075.

If the moving party meets its Rule 56(c) burden, the nonmovant must do more than show that there is some metaphysical doubt as to the material facts. The nonmoving party must go beyond the pleadings and come forward with specific facts showing that there is a genuine issue for trial; if the nonmoving party fails to meet this burden, the motion for summary judgment must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed. 2d 265 (1986). Conclusory allegations unsupported by specific facts, however, will not prevent an award of summary judgment; the nonmoving party cannot rest on his allegations to get to a jury without "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 106 S.Ct. at 2510 (citations omitted). If a

rational trier could not find for the nonmoving party based on the evidence presented, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986).

B. Plaintiff's Strict Liability Claim

Plaintiff has cited several Fifth Circuit and Texas state court opinions which state that products liability cases may be proven by circumstantial evidence. Plaintiff has offered circumstantial evidence to rebut Defendants' motion for summary judgment.

Defendants have not responded to this argument. The Court is therefore of the opinion that Defendants' Motion for Summary Judgment on this issue should be DENIED because Defendants have not shown that they are entitled to judgment as a matter of law.

C. Plaintiff's Breach of Warranty Claims

Defendants have moved for summary judgment on this cause of action and in their motion have pointed out the absence of any proof of an express or implied warranty upon which Plaintiff may have relied. Under *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed. 2d 265 (1986), Plaintiff is required to go beyond the pleadings and come forward with specific facts showing that there is a genuine issue for trial. The Court must grant the motion for summary judgment if Plaintiff fails to meet this burden. Conclusory allegations unsupported by specific facts, however, will not prevent

an award of summary judgment; under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 106 S.Ct. at 2510, Plaintiff is not permitted to rest on his allegations to get to a jury without "any significant probative evidence tending to support the complaint."

A review of the record indicates that it contains no proof of an express warranty or any implied warranty of either merchantability or of fitness for use for a particular purpose.[1] The Court is therefore of the opinion that Defendants' motion for summary judgment on this cause of action should be GRANTED.

D. Plaintiff's Res Ipsa Loquitur Claim

Plaintiff's negligence claim against Defendants asserts the theory of res ipsa loquitur. Defendants have moved for summary judgment on this claim and contend that there is a failure of proof as to whether Defendants were negligent and as to causation. Plaintiff has offered no evidence on the issue of negligence.

Res ipsa loquitur is properly invoked when surrounding circumstances are such that the mere occurrence of an event, by itself, supports an inference that there was negligence involved, and that the defendant was the negligent party. *See, Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 250-52 (Tex. 1974). In *Smith v. Xerox Corp.*, 866 F.2d 135, 140 (5th Cir. 1989), the Fifth Circuit Court of Appeals stated that the following factors must be present

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[1] Furthermore, Defendants have raised the affirmative defense of failure to notify as required by Texas law, an assertion to which Plaintiff has not responded.

for the res ipsa loquitur rule of circumstantial evidence to apply: (1) the circumstances surrounding the accident must create a presumption of negligence on the part of the defendant; (2) control and management of the instrumentality which caused the accident must have been vested exclusively in the defendant; and (3) the plaintiff's position must be such that he or she is unable to obtain information regarding the cause of the accident. Additionally, it is necessary that the likelihood of other causes of the accident be sufficiently reduced so that the fact finder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to the party against whom the doctrine is employed in order for the doctrine of res ipsa loquitur to apply. *Higginbotham v. Mobile Oil Corp.*, 545 F.2d 422, 430 (5th Cir. 1977).

The Texas courts are in agreement with the Fifth Circuit. In *Jones v. Tarrant Util. Co.*, 638 S.W.2d 862, 865 (Tex. 1982), the Texas Supreme Court stated that to prevail under the theory of res ipsa loquitur, the plaintiff must demonstrate that the nature of the accident is such that it would ordinarily not occur in the absence of negligence and that the instrumentality causing the accident must have been under the control of the defendant. This definition was expressed in *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 250-51 (Tex. 1974), as a two part test: first, the nature of the accident must be such that it would ordinarily not occur in the absence of negligence; and second, the instrumentality causing the accident must have been under the management and control of the defendant. *See also, Haddock v. Arnspinger*, 793 S.W.2d 948, 950 (Tex. 1990). In order to rely on the doctrine, the plaintiff must produce evidence from which the jury can conclude, by a

preponderance of the evidence, that both the "type of accident" and "control" factors are present. *Mobil Chem. Co.* at 252.

Based on the controlling case law, it is evident that Plaintiff is required to prove both that the accident was such that it would ordinarily not occur in the absence of negligence and that the instrumentality causing the accident, here the 1985 Mercedes, was under the exclusive management and control of Defendants. Plaintiff must also show that the likelihood of other causes of the accident are sufficiently reduced so that the fact finder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to Defendants.

This Plaintiff cannot do. First, automobile accidents occur on a regular basis due to countless other reasons than automotive defects. Driver error, mechanical problems caused by improper maintenance, and poor driving conditions spring to mind as reasons more likely than defects to cause accidents. Second, the 1985 Mercedes was not under the exclusive management and control of Defendants. It was being driven by Plaintiff at the time of the accident. The Mercedes was owned by a friend of Plaintiff – not by Defendants. The vehicle was a 1985 model year car and was involved in an accident in 1992 – approximately seven years and an unknown number of repairs after leaving a dealer's lot. It is the Court's opinion that the doctrine of res ipsa loquitur is not applicable to the facts of this case and that summary judgment should be granted to Defendants on this cause of action.

III. CONCLUSION

It is the Court's opinion that Defendants' Motion for Summary Judgment should be GRANTED on Plaintiff's claims of breach of warranty and res ipsa loquitur. It is the Court's opinion that Defendant's Motion for Summary Judgment should be DENIED on Plaintiff's products liability claim.

It is so ORDERED.

The Clerk shall enter this Order and provide a true copy to all parties.

Signed this 14th day of June, 1995.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT
JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21081

JERRY BAKER, ET AL.,

Plaintiffs,

JERRY BAKER,

Plaintiff-Appellant,

versus

MERCEDES BENZ OF NORTH AMERICA;
DAIMLER BENZ AG,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(Filed May 21, 1997)

Before POLITZ, Chief Judge, SMITH and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:

This matter involves the timeliness of an appeal from adverse rulings on motions for summary judgment in a personal injury case. Because the trial court refused to enter a separate document judgment as Rule 58 requires, we must vacate and remand.

BACKGROUND

Jerry Baker used a friend's 1985 Mercedes Benz 380 SE to go to a store to buy cigarettes. During the trip he alleges that the Mercedes 380 SE suddenly and unexpectedly accelerated uncontrollably.[1] Baker lost control of the vehicle and struck a utility pole, sustaining serious injuries.

The wrecked Mercedes apparently went to a junk dealer who disposed of the front end. Sometime thereafter Baker sued Mercedes Benz and its German counterpart, Daimler-Benz, under Texas law for breach of warranty, negligence, and strict products liability. Because the front end of the car was not available, neither Baker nor the Mercedes defendants had an opportunity to examine the vehicle for defects. This absence of evidence is vital to the motions of Mercedes for summary judgment filed in October of 1994 and in September 1995, motions which form the basis of this appeal.

Upon initial consideration the trial judge granted the October 1994 motion as to the breach of warranty[2] and negligence claims,[3] but denied it as to the products

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[1] Mercedes contests this allegation, but on a motion for summary judgment the nonmovant's evidence is to be believed and all justifiable inferences are to be drawn in his favor. **Eastman Kodak Co. v. Image Technical Servs., Inc.**, 504 U.S. 451 (1992). The court accepts as true Baker's summary judgment assertions.

[2] The district judge found that Baker had offered no evidence of either an express or implied warranty upon which he relied.

[3] Baker's negligence claim invokes res ipsa loquitur. The district judge dismissed this claim, finding that Baker failed to produce evidence of some res ipsa loquitur elements.

liability claim on the grounds that Mercedes failed to respond to Baker's proffered circumstantial evidence regarding defects present in the automobile. The court later memorialized these findings and orders in a June 1995 memorandum opinion and order.

In September 1995 Mercedes moved to exclude Baker's expert testimony regarding a defect in the vehicle, and reurged its motion for summary judgment on the products liability claim. The district court excluded Baker's expert under the holding of **Daubert v. Merrell Dow Pharmaceuticals, Inc.**[4] and granted summary judgment on the products liability claim on the grounds that Baker had failed to show that the car was defective as defined by Restatement (Second) of Torts § 402A.

The court signed the memorandum opinion and order excluding Baker's expert and granting the summary judgment on the products liability claim on October 31, 1995. That writing concluded with the statement, "This is a final judgment." On November 22 Baker filed an untimely motion to reconsider, but before the court ruled thereon he filed a "Motion for Leave to Late-File the Notice of Appeal Based on Excusable Neglect." On December 26, 1995, the court affirmed its October 1995 order and denied Baker leave to file a late notice of appeal.

On January 8, 1996, Baker moved the court to set aside its December 26 order and requested a separate

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[4] 509 U.S. 579 (1993).

document judgment under Federal Rule of Civil Procedure 58,[5] asserting that confusion relating to the absence of a separate document judgment caused his delay in moving for reconsideration of the October 31 order. The district court denied Baker's requests on January 11, 1996, and on January 25, 1996, Baker filed a notice of appeal.

ANALYSIS

Our threshold consideration is whether we have jurisdiction over this appeal. That jurisdiction requires a final and appealable order that complies with Rule 58. In early cases we held that Rule 58 had to be applied mechanically. Judgments had to be on a document separate and apart from any other order or memorandum

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[5] Rule 58 provides, in pertinent part, as follows:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. *Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).*

FED. R. CIV. P. 58 (emphasis added).

opinion.[6] This was in accordance with a mandate from the Supreme Court.[7]

In 1977 the Supreme Court revisited Rule 58 in **Bankers Trust Co. v. Mallis,**[8] involving an appeal under 28 U.S.C. § 1291, which provides that the courts of appeals have appellate jurisdiction over "final decisions" of the district courts. **Mallis** focused on whether a decision of the district court can be a "final decision" when it does not conform to Rule 58's separate document requirement.

Neither party in **Mallis** was concerned with the absence of a separate document judgment because both assumed that the order dismissing the case was appealable. In that circumstance, the Court stated that the parties were free to waive Rule 58's requirements and proceed with the appeal; therefore a document that fails to comply fully with Rule 58 in the right circumstances can be a "final decision" for appellate jurisdiction purposes. Otherwise, however, "[t]he 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered."[9] Rule 58 is thus a safety valve preserving a litigant's right to appeal in the absence of a separate document judgment.

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[6] *See, e.g.*, **State Nat'l Bank of El Paso v. United States,** 488 F.2d 890 (5th Cir. 1974) (holding that a document entitled "Opinion and Judgment" did not comply with Rule 58); **Taylor v. Sterrett,** 527 F.2d 856 (5th Cir. 1976).

[7] *See* **United States v. Indrelunas,** 411 U.S. 216 (1973).

[8] 435 U.S. 381 (1978) (per curiam).

[9] **Id.** at 385 (citing *Indrelunas,* 411 U.S. at 220-22).

Mallis teaches that where the parties voluntarily proceed on appeal from an otherwise final and appealable order but lack a Rule 58 separate judgment, the courts of appeals may hear the appeal.[10] If a separate document judgment is not entered, however, the time for filing an appeal does not begin to accrue until a judgment complying with the Rule 58 dictates has been entered. The rule is to be " 'interpreted to prevent the loss of the right of appeal, not to facilitate loss.' "[11]

In the present case Mercedes seeks a holding that even in the absence of a Rule 58 judgment Baker has forfeited his right to appeal by failing to file a notice of appeal within thirty days of the October 31, 1995 opinion and order. On this point the **Mallis** holding is dispositive: Baker's right to appeal cannot be prejudiced by failing to file a notice of appeal when no Rule 58 separate document judgment has been entered. Rule 58 plainly provides that "[e]very judgment shall be set forth on a separate document." It is undisputed that the ruling at issue in this case was an extensive written opinion concluding with the sentence: "This is a final judgment." There was no separate document judgment.

Mercedes further contends that Baker waived the benefits of Rule 58, as defined in **Mallis**, because in subsequent motions he referred to the October 1995 opinion and order as a "final judgment." **Mallis** is not authority for that proposition for the Court there expressly

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[10] *See also* **Hanson v. Town of Flower Mound**, 679 F.2d 497 (5th Cir. 1982) (holding that where the parties fail to raise the Rule 58 issue, the court should proceed to hear the appeal).

[11] **Mallis**, 435 U.S. at 386 (quoting 9 MOORE'S FEDERAL PRACTICE 119-20 (1970)).

recognized that the appeals timetable only runs from entry of a judgment that complies with Rule 58.[12]

We conclude and hold that the October 1995 opinion and order does not comply with the requirements of Rule 58. There has been no final judgment and Baker was not required to appeal although he has attempted to do so.

We next consider whether we appropriately may address the merits of the appeal. **Whitaker v. City of**

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[12] Mercedes cites to **United States v. Kellogg,** 12 F.3d 497 (5th Cir. 1994), and **InterFirst Bank Dallas, N.A. v. F.D.I.C.,** 808 F.2d 1105 (5th Cir. 1987), for the proposition that an order combining an opinion and a ruling on a motion to dismiss satisfies the separate document requirement of Rule 58. We do not find the holdings in these cases dispositive of the issue before us today or inconsistent with our disposition. We have treated differently the cases in which no Rule 58 judgment was entered but which did involve certain Fed.R.App.P. 4(a)(4) post-judgment motions, from those which did not involve Rule 4(a)(4) motions. *Compare, e.g.,* **United States v. Perez,** 736 F.2d 236 (5th Cir. 1984) and **Ellison v. Conoco, Inc.,** 950 F.2d 1196 (5th Cir. 1992), *cert. denied,* 509 U.S. 907 (1993) (both apparently holding that appellate timetables begin to run from the granting or denial of certain post-judgment motions enumerated in FED. R. APP. P. 4(a)(4) even without a Rule 58 judgment) *with* **Theriot v. ASW Well Serv., Inc.,** 951 F.2d 84 (5th Cir. 1992) and **Whitaker v. City of Houston,** 963 F.2d 831 (5th Cir. 1992) (neither involving post-judgment motions and both recognizing that under **Mallis,** neither party is required to appeal from a judgment until a Rule 58 separate document judgment has been entered). The **Perez** and **Ellison** line of cases appears to rely on language in Rule 4(a)(4) to the effect that the time for filing an appeal runs from "the entry of the order disposing" of a post-trial motion, a result arguably inconsistent with Fed.R.App.P. 4(a)(7), which provides that judgments or orders are only deemed "entered" under Rule 4 when entered in compliance with Fed.R.Civ.P. 58.

Houston, provides the answer to this inquiry: "Generally, this court declines . . . to hear the appeal if the status of a post-judgment motion is unclear due to the lack of a Rule 58 judgment or if the notice of appeal would have been untimely if the order appealed had constituted a Rule 58 judgment."[13] Presumably, the "order appealed" is the October 31, 1995 summary judgment opinion on the products liability claim that disposed of the final cause of action. Because Baker did not file a notice of appeal within 30 days of that order, and filed no other post-judgment motions in a timely manner that could extend the 30-day period, we must decline to hear Baker's appeal on the merits at this time.

We conclude otherwise as to the timeliness of Baker's appeal of the trial court's denial of his motion to enter a separate document judgment.[14] We have jurisdiction over that part of this appeal. Expressing no view as to the merits of the underlying appeal, we VACATE and REMAND with instructions that a separate document judgment consistent with Rule 58 be entered herein.

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[13] 963 F.2d at 834.

[14] *In re* **Seiscom Delta,** 857 F.2d 279 (5th Cir. 1988).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21081

D.C. Docket No. CA-H-93-1761

JERRY BAKER; ET AL
Plaintiffs

JERRY BAKER

Plaintiff - Appellant

v.

MERCEDES BENZ OF NORTH AMERICA;
DAIMLER BENZ AG

Defendants - Appellees

Appeals from the United States District Court
for the Southern District of Texas, Houston

Before POLITZ, Chief Judge, SMITH, and DUHÉ, Circuit Judges.

JUDGMENT

(Filed May 21, 1997)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District court with instructions that a separate document judgment consistent with Rule 58 be entered herein.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: June 12, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO.**
v.	§	**H-93-1761**
	§	
MERCEDES BENZ OF	§	
NORTH AMERICA and	§	
DAIMLER BENZ AG,	§	
Defendants.	§	

ORDER

Pending before the Court is Plaintiff's Motion to set aside the Court's order of December 26, 1995 and motion for entry of a final one page appealable order (Docket #59). The Plaintiff argues that under Federal Rule of Civil Procedure 58, this Court must file a one-page final judgment separate from the Memorandum Opinion.

> Although Rule 58 requires that the judgment be set forth on a separate document, "[i]n *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S. Ct. 1117, 55 L.Ed.2d 357 (1978), the Supreme Court concluded that an order combining an opinion and a ruling on a motion to dismiss generally satisfied the separate document requirement of Rule 58." *InterFirst Bank Dallas, N.A. v. Federal Deposit Ins. Corp.*, 808 F.2d 1105, 1108 (5th Cir. 1987); *see also Ellison v. Conoco Inc.*, 950 F.2d 1196 (5th Cir. 1992) (approving of use of same document for opinion and ruling to achieve finality under Rule 58).

United States v. Kellogg, 12 F.3d 497, 501 n.2 (5th Cir. 1994). On October 25, 1995, this Court signed a Memorandum

Opinion and Order which was entered on October 31, 1995. That document stated: "This is a FINAL JUDGMENT." This satisfies the separate document requirement of Rule 58. The Motion is DENIED.

So ORDERED. The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 9th day of January, 1996.

/s/ John D. Rainey
JOHN D. RAINEY

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO.**
v.	§	**H-93-1761**
	§	
MERCEDES BENZ OF	§	
NORTH AMERICA and	§	
DAIMLER BENZ AG,	§	
Defendants.	§	

ORDER

Pending before the Court are Plaintiff Jerry Baker's Motion for Reconsideration (Docket #54) and Motion for Leave to file notice of appeal (Docket #55). The Motion for Reconsideration was not filed timely, and is DENIED. For the following reasons, the Motion for Leave is also DENIED.

Baker cites FED. R. APP. P. 4(a)(5) for the proposition that "Rule 4 gives this Court discretion to permit the late filing of a Notice of Appeal . . . " This statement is misleading. More precisely, the rule states that the Court may, "upon a showing of excusable neglect or good cause," extend the time for filing a notice of appeal.[1] Baker's reason for requesting an extension is that his counsel "miscalculated the amount of time Plaintiff had to file a Motion for Reconsideration or Motion for a New

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[1] Baker may assert that this Court has discretion because its finding regarding excusable neglect would be reviewed for abuse of discretion. *See United States v. Clark*, 51 F.3d 42, 43 n.5 (5th Cir. 1995).

Trial." Therefore, this Court must determine whether, under the facts of this case, miscalculation of the time for appeal constitutes "excusable neglect."

In making this determination, this Court must follow the Supreme Court's decision in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). *Pioneer* interprets "excusable neglect" standards in the context of Bankruptcy appeals, but the Fifth Circuit has extended its application to criminal appeals, *Clark*, 51 F.3d at 44, and there is no reason to believe it would hold otherwise in a civil case.[2]

In *Pioneer*, the Supreme Court "rejected the argument that excusable neglect was limited to errors caused by circumstances beyond the late-filing party's control, concluding that the concept of neglect is 'somewhat elastic' and may include 'inadvertent delays.' " *Clark*, 51 F.3d at 43 (citing *Pioneer*, ___ U.S. at ___, 113 S.Ct. at 1496). However, "inadvetence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, ___ U.S. at ___, 113 S.Ct. at 1496.

"In determining whether [Baker's] neglect is excusable, the court . . . [must take] into account the following

---

[2] In explaining its decision, the Fifth Circuit "note[d] the uniformity of the Circuits in extending *Pioneer* beyond the context of bankruptcy. *See City of Chanute v. Williams Natural Gas. Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) (Fed.R.App.P. 4(a)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 135 (1995); . . . *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) (Fed.R.App.P. 4(a))." *Clark*, 51 F.3d at 44.

circumstances: 'the danger of prejudice to the [defendant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.' " *Clark*, 51 F.3d at 44, (quoting *Pioneer*, ___ U.S. at ___, 113 S.Ct. at 1498). Here, the danger of prejudice to defendant is clear: A final judgment in its favor could be reversed. Even an appeal ending in affirmance would require the expenditure of further fees and expenses that will not be required if excusable neglect is not found. The length of the delay, admittedly, is not significant here. However, the reason for the delay given by Baker in his counsel's miscalculation of a straightforward appellate timetable. Finally, there is no reason to believe that Baker or his counsel acted other than in good faith.

In *Clark*, the Fifth Circuit remanded a case to the district court to apply these standards. *Id.* In doing so, however, the court noted that on the facts of that case, it would not be an abuse of discretion for the district court to find no excusable neglect. The case was

> a garden variety criminal appeal; there was nothing complicated or novel about the procedural posture of the case, and noticing an appeal . . . required nothing unusual or difficult. The applicable rules are, furthermore, unambiguous, and whatever confusion Clark's counsel may have suffered because of these rules, we clearly cannot say that his confusion mandates a finding of excusable neglect as a matter of law.

Id. This case is exactly the same. Baker has not shown excusable neglect or good cause why time should be

extended to file a notice of appeal. Therefore his Motion for Leave is DENIED.

So ORDERED. The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 21st day of December, 1995.

/s/ John D. Rainey
JOHN D. RAINEY

UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20723

JERRY BAKER; SALMA WASHINGTON BAKER

Plaintiffs

JERRY BAKER

Plaintiff-Appellant

v.

MERCEDES BENZ OF NORTH AMERICA;
DAIMLER BENZ AG

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING

(Filed Dec. 29, 1998)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

APPENDIX D

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity

for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

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28 U.S.C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
	§	
Plaintiff,	§	
	§	C.A. NO.
VS.	§	H-93-1761
	§	
MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ AG,	§	JURY TRIAL IS REQUESTED
	§	
Defendant.	§	

AFFIDAVIT

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Before me, the undersigned authority, personally appeared Jerry Baker, who after being duly sworn deposed and stated as follows:

"My name is Jerry Baker. I am over the age of 21 years, and am qualified in all respects to make this affidavit. I have personal knowledge of the facts that follow gained from being the Plaintiff in this cause, and the facts that follow are within my personal knowledge and are true and correct.

"On or about May 27, 1992, I was driving a Mercedes 380 SE, V.I.N. WDBCA32C2FA189061, on South Polk Street in Dallas, Dallas County, Texas, at approximately 30 to 35 miles per hour

when the Mercedes suddenly took off, reaching a fast rate of speed and making sideways movements. Although I applied my brakes, the Mercedes continued to accelerate. It did not slow or stop until it crashed into a pole.

"I know the accident was not my fault. I did not intend for the vehicle to take off like it did; it just did it. I was very surprised when the car started speeding up by itself.

"As a result of the accident, I am an incomplete quadriplegic."

Further, Affiant sayeth not.

/s/ Jerry Baker
JERRY BAKER

Subscribed and sworn to on the 1st day of November, 1994, to certify which witness my hand and seal.

/s/ Raul A. Vasquez
NOTARY PUBLIC –
STATE OF TEXAS

[SEAL] RAUL A. VASQUEZ
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 19, 1995

McDOWELL OWENS

September 16, 1994

Robert O'Conor Esq.
1301 McKinney, Suite 3177
Houston, Texas 77010

Re: Jerry Baker vs. Mercedes Benz, et al.
Your File No: 92-188
Our File No: 942347

Dear Mr. O'Conor;

McDowell Owens Engineering, Inc. has completed a preliminary analysis of the vehicle, driven by Mr. Jerry Baker at the time that he sustained his injuries, and is submitting this report of our findings for your review.

It is our understanding that Mr. Baker was driving a 1985 Mercedes 380 SE, owned by Ms. Lorraine Thomas, on May 27, 1992. He was reportedly driving the vehicle at the posted speed limit of 35 mph when the vehicle began accelerating uncontrollably resulting in an impact between the vehicle's rear end and a utility pole.

We received and reviewed several documents from your office and obtained additional documents, that are enclosed with this report, noting that there had been several complaints of unintended acceleration in the 300 series Mercedes. Additionally we inspected the vehicle involved in the collision.

The inspection of the Mercedes 380 took place on September 7, 1994. This vehicle was manufactured in August 1985 with Vehicle Identification Number: WDBCA32C2FA189061. The front-end of this vehicle had been clipped from the A-pillars forward, thus leaving no engine, dash panel, steering, or

braking controls to inspect. The right rear brake disc and the left rear disc and caliper in addition to the rear tail light assemblies were the only components remaining from the vehicle's braking system. A close examination of the bulbs in the taillight assembly revealed that some of them had been illuminated at the time of the collision. Both brake light and parking light bulbs on each side exhibited signs of being illuminated at the time of the collision. The filament in the left brake bulb was broken and adhered to glass slivers within the bulb, indicating that the filament was hot enough to slightly melt the glass. The right brake bulb contained a broken filament and the bulb was blackened, indicating the filament was energized at the time it was broken.

Because of a lack of evidence on the vehicle no determination could be made about the acceleration allegation, however, it was apparent through the bulb examination that the brakes were being applied at the time of the collision. This tends to negate any possibility that an unintended acceleration was the result of improper pedal depression.

It is the opinion of McDowell Owens Engineering, Inc. that insufficient physical evidence exists to confirm that an unintentional acceleration occurred while Mr. Baker was driving the Mercedes 380 SE on May 27, 1992. There was evidence, however, to indicate that the vehicle's brakes were applied at the time of impact.

If we can be of further assistance to you or if you require additional information, please call our office.

Respectfully submitted,
McDOWELL OWENS
ENGINEERING, INC.

/s/ Derek T. Nolen
Derek T. Nolen, P.E.
Consulting Engineer

/s/ Roger L. Owens
Roger L. Owens, P.E.
Engineering Manager

DTN/pp
enclosures

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
CASE NO. 579333

SAMUEL BARIS, Plaintiff, v. DAIMER [sic] BENZ AG; MERCEDES-BENZ OF NORTH AMERICA, a Delaware corporation; DAIMLER-BENZ OF NORTH AMERICA HOLDING COMPANY, INC., a Delaware corporation; V.I.P. MOTOR CARS, LTD., a California corporation, and DOES I through XXX, inclusive, Defendants.	Deposition of: AXEL STEHLE

TRANSCRIPT of testimony as taken by and before ROSEMARY MARINO, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of WAGA & SPINELLI, 405 Northfield Avenue, West Orange, New Jersey, on Tuesday, April 25, 1989, commencing at 10:15 in the forenoon.

* * *

[p. 47] of different errors or is there one basic error that you found to be at the root of these incidents or most of them?

A. Can you repeat this please?

Q. Yes. You indicated that it's your feeling that the unexplained or sudden acceleration phenomenon can be explained by driver error in essence. That's a fair statement?

A. That is correct.

Q. I am wondering whether you have come to a particular or if you have refined that further to describe a particular type of driver error or whether it's just many different errors that add up to this phenomenon.

A. I would say it's a driver error.

Q. Can you describe that error in general, what that error is if it's a single type of error.

A. In severe accidents or incidents – well, accidents, we could prove that the driver, was, for example, on the gas pedal and not on the brake pedal.

Q. Are there incidents where the

* * *

[p. 82] CERTIFICATE

I, ROSEMARY MARINO, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that prior to the commencement of the examination the witness was sworn by me to testify the truth, the whole truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

/s/ Rosemary Marino
Notary Public of the State of New Jersey
Certificate Number XI00875

My Commission expires April 30, 1992

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
CASE NO. 579333

SAMUEL BARIS, Plaintiff, v. DAIMER [sic] BENZ AG; MERCEDES-BENZ OF NORTH AMERICA, a Delaware corporation; DAIMLER-BENZ OF NORTH AMERICA HOLDING COMPANY, INC., a Delaware corporation; V.I.P. MOTOR CARS, LTD., a California corporation, and DOES I through XXX, inclusive, Defendants.	Deposition of: GARY H. BOWNE

TRANSCRIPT of testimony as taken by and before ROSEMARY MARINO, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of WAGA & SPINELLI, 405 Northfield Avenue, West Orange, New Jersey, on Tuesday, April 25, 1989, commencing at 10:15 in the forenoon.

* * *

[p. 8] A. Yes.

Q. With respect to this particular case, obviously I suspect you already understand that it involves a sudden or unexplained acceleration; correct?

A. Yes.

Q. When did you first learn of this case?

A. I don't recall the exact date.

Q. Do you have an idea of how long after it occurred that you first found out about it? Talking about a week, a month, a day.

A. I would say in general 30 days probably.

Q. You understand also that the reason that you were picked out of all the people in Mercedes is that when I asked the Mercedes' attorney to tell me who the most people knowledgeable about sudden acceleration problems, testing involved in that, Mercedes has done and other areas concerned with that particular aspect of the Mercedes automobile two names were given to me. Mr. Stehle who is still seated here and [p. 9] yours. Okay?

A. Yes.

Q. So basically the purpose of this deposition will be to find out a little bit what you do know about those items so I can hopefully have some understanding of it too. Fair enough?

A. Okay.

MR. DORT: Just let me say for the record that the basis for Mr. Bowne and Mr. Stehle's name appearing would be better stated where it is in the interrogatories and the answers versus your summation of it. I am not positive that that's correct so from that standpoint I will object to that outline of it but other than that I have no objection.

MR. REED: Okay. I agree with Mr. Dort that the interrogatories will say what they say but if I didn't say it right then they will tell us.

Q. When did you first begin getting involved in the sudden acceleration matters?

A. Approximately November of 1985 I believe.

* * *

[p. 21] A. Driver error.

Q. What sort of driver error?

A. Pedal misapplication.

Q. You mean hitting the gas instead of the brake?

A. Yes.

Q. Is there anything else you've been able to determine in your investigations and analyses that causes sudden accelerations apart from hitting a wrong pedal?

A. Not that I can recall.

Q. Did you do any specific study or analysis of the Baris problem in the Baris case?

A. What do you mean specific analysis? I don't –

Q. Well, were you involved in analyzing it yourself? The automobile ever?

A. No.

Q. Did you read the reports and discuss the case with others?

A. I believe – I know I read the reports because I read every report that comes in but I don't believe I really discussed that particular one with anybody.

[p. 22] Q. There are some others where you took a more active role in the analysis and investigation; is that correct?

A. Yes, the ones that I inspected myself.

Q. Can you remember the names of any of those?

A. Not really.

Q. Jerome Rice ring a bell?

A. Jerome Rice. I don't recall.

Q. How about Klaus Knapp, K-n-a-p-p?

A. I don't recall that one either.

Q. Marsit Simmons, M-a-r-s-i-t S-i-m-m-o-n-s?

A. It's difficult because I remember – all these names are familiar to me but that's the problem I am having. All the names are familiar but I can't separate the ones that I've looked at from the ones – the cases that I know because I see every case that comes in.

Q. When is the last time or the most recent time you went out to examine a particular case?

MR. DORT: Sudden acceleration?

MR. REED: Yes, sudden

* * *

[p. 34] something malfunctioned?

A. Yes.

Q. What do you do? What sort of tests do you do? First off, I guess to ask first thing, do you have a protocol you follow or do you test each one differently?

A. No, we have a protocol that we follow.

Q. Can you give me a basic approach then? Assume you are going out, you just had a complaint, a person was in a car and shifted it into drive and it shot off and ran into the street and the person was able to stop it, and now they've called you? You go out, the car is sitting there in the driveway and the person says here are the keys, what happened here, what do you do?

A. You are saying there's no accident involved, just an incident.

Q. Well, there has to be an accident. Assume it smashed into a wall and the car is still sitting there and you can see it, you could even move it if you had to.

A. Okay. Normally the vehicles that we look at are at a dealership, normally. I would inspect the throttle linkage to make [p. 35] sure that it operates freely and there is no evidence of binding both from in the engine compartment and via the accelerator pedal.

Q. You've done that in the circumstances you've been involved in?

A. Yes.

Q. Have you also noted that in the reports, that that's been done, and in each of the other investigations that's been done by other people like Mr. Stehle or Mr. Stahling?

A. Yes.

MR. DORT: If the car is available.

A. Yes, if there was an opportunity to inspect the car, yes.

Q. We are assuming that for this line of questions because we are talking about the inspection of the car.

A. Okay.

Q. In any of the investigations you've been aware of or familiar with or even read or heard about, has there ever been one where that throttle linkage was binding which therefore may have created this problem of [p. 36] sudden acceleration?

THE WITNESS: Can I talk to you for a minute before I answer the question?

MR. DORT: Sure.

(Discussion held off the record between the witness and his counsel outside of the deposition room.)

A. Could you repeat the question again?

Q. Sure.

When you were investigating – in all the reports and things that you've been involved in or heard of, has it ever been determined that the throttle linkage sticking problem that you've examined each of these automobiles for was the cause of any of these accelerations?

A. Yes and no.

Q. Well, good clear answer. Maybe I could explore that just a bit.

A. Okay.

Q. First off, what do you mean by yes?

A. Well, the yes portion is there have been cases where the throttle – where the throttle linkage has been stuck. The no [p. 37] portion – do you want me to answer the no portion now? I assume you are going to ask that next.

Q. You are ahead of me but on the right direction.

A. The no portion is that those particular cases were not sudden acceleration cases.

Q. Those were continued to run cases?

A. Those were cases involving some speed 40, 50 miles an hour where the throttle was depressed and it didn't return.

Q. Did those involve accidents?

A. No.

Q. So, with respect to sudden acceleration cases, you haven't either yourself found or you haven't learned from any of the other engineers who have found a throttle linkage sticking as a root cause?

A. Not that I recall, no.

Q. Now, after you finish examining that component, what did you do next?

A. Depending on whether the vehicle is damaged or not, perform a test drive to check the brake operation, cruise control

* * *

[p. 49] CERTIFICATE

I, ROSEMARY MARINO, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that prior to the commencement of the examination the witness was sworn by me to testify the truth, the whole truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

/s/ Rosemary Marino
Notary Public of the State of New Jersey
Certificate Number XI00875

My Commission expires April 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY BAKER,	§	
Plaintiff,	§	
	§	C. A. NO.
VS.	§	H-93-1761
MERCEDES BENZ OF NORTH AMERICA and DAIMLER BENZ AG,	§	JURY TRIAL IS REQUESTED
Defendant.	§	

DECLARATION OF JAMES P. McCANN

My name is James P. McCann. I am a registered professional engineer in the states of Indiana, Kentucky, Michigan and Ohio. I am a graduate of Purdue University with a degree of Bachelor of Science in Mechanical Engineering. I have been a practicing engineer for over 15 years. I have been a member and have been affiliated with the following organizations: The American Society of Heating, Refrigerating and Air Conditioning Engineers; The Society of Automotive Engineers; The Electric League of Indiana; the National Society of Professional Engineers; the National Fire Protection Association; the Indiana Arson and Crime Association; the American Society of Mechanical Engineers; the Construction Specifications Institute; and the National Association of Traffic Accident Reconstructionist and Investigator. Each of the societies, associations and institutes listed above publish

literature which they send to their members. I routinely review the literature in my engineering practice.

In my 15 plus years of engineering experience, I have been involved in the investigation of over 1000 automobile accidents. I have also investigated various electrical circuitry and mechanical apparatus for defects. As an integral part of my practice, I have continuously reviewed literature on the subject of electromagnetic interference and electromagnetic compatibility. The topic of electromagnetic interference and electromagnetic compatibility has been discussed and analyzed considerably over the last 50 to 60 years. Electromagnetic interference ("EMI") is defined as any man made or natural electromagnetic disturbance which causes malfunctioning or degradation of performance in any device or system. Almost any circuit or device carrying electric current is a possible source of interference since the EMI is generated by a varying electric or magnetic field. The Institute of Electric and Electrical Engineers (hereinafter "IEEE") has published literature on electromagnetic compatibility for several decades. In my practice I have continuously reviewed literature published by the Institute of Electronic and Electrical Engineers discussing the problems associated with electromagnetic interference.

In addition, The Society of Automotive Engineers, in its Transactions publication and its SAE Handbook, has published various articles on electromagnetic susceptibility ("EMS"), electromagnetic compatibility ("EMC"), and electromagnetic interference ("EMI"). Electromagnetic susceptibility defines a condition where unwanted

electromagnetic energy, which is coupled to a victim circuit, has reached the threshold level of performance degradation. Electromagnetic compatibility is the generic name given to technology that is concerned with the suppression, mitigation, or control of electromagnetic interference from internal or external source environments. In short, there have been volumes of learned publications that have discussed electromagnetic interference, electromagnetic compatibility, and electromagnetic susceptibility.

Examples of electromagnetic interference are rampant in any kind of electronic circuitry. For example, in 1964 the IEEE Transaction on EMC published a paper entitled "Automotive Ignition Interference." See Exhibit "1" attached. The article states that "from electromagnetic theory it is known that any sudden change of electric current will produce electromagnetic fields capable of causing interference with radio communication. Such changes occur in the normal operation of many items of equipment on a motor vehicle. Examples of these are the ignition system, the generator, windshield wiper and fan motors, and the vibrating contact circuit of voltage regulators. The major source of interference is the radiation from the ignition system." *Id.* at p. 15. This article shows that as far back as 1964 there were problems with electromagnetic interference in automobiles.

In 1964 an article entitled, "Electromagnetic Compatibility in Weapon Systems" was published in the IEEE *Transactions on EMC*. See Exhibit "2" attached. The article stated, "the high density of electrical and electronic equipment in modem weapon systems, the extension of performance limits of both equipment and the weapon

systems in growth and complexity and quantity of systems have greatly aggravated the problem of insuring electromagnetic compatibility. Electromagnetic incompatibility can exist as soon as two or more of the most minor elements of the system are placed in a common environment, and the probability of incompatibility increases each time a new element is added. Problems of electromagnetic incompatibility are not merely academic. They range from annoying degradation of performance of radio receivers by the detection of interference which results in static in the receiver, to complete receiver malfunction, when the interference masks the desired signal to catastrophic malfunction, such as from interference in computers or by premature detonation of electroexplosive devices which result in a complete loss of the weapon system." *Id.* at p. 76. This article highlighted the problems caused by different component part manufacturers providing components integrated into weapon systems and the corresponding need for equipment interference specifications and the observance of the specifications by the different contractors and sub-contractors. When weapon systems are ordered from different contractors, it is necessary to make the different components compatible with others. This is an important observation in light of the fact that the electronic circuitry involved in the Mercedes vehicle in question is put together by different component part manufacturers. It is important for those component part manufacturers to coordinate their efforts to provide compatibility. Furthermore, as more circuitry is introduced into an automobile, the danger and risk of electromagnetic interference is intensified.

There have been many other examples of electromagnetic incompatibility recognized throughout the literature on electromagnetic compatibility and electromagnetic interference. For example, in 1972 IEEE International ("EMC") article entitled *"Electromagnetic Compatibility of Cardiac Pacemakers"* described tests performed on pacemakers implanted in large dogs having surgically induced atrioventricular heart blocks. See Exhibit "3" attached. The article stated "[f]ield intensities as low as a few volts per meter caused complete inhibition (cutoff of pacemaker activity) of some pacemakers, whereas others in the same tests were essentially unaffected in fields 100 times higher." *Id.* at p. 5. "These test results, plus data from other similar studies, indicate a need for further improving of such medical prosthetic devices in order to be compatible with the ever-increasing electromagnetic radiation background found in many major metropolitan areas today." *Id.* This article is significant to demonstrate the severity of the problem with electromagnetic interference. EMI can have catastrophic results to those who must use medical equipment such as pacemakers. In fact, our everyday experiences teach that EMI is a significant concern. Signs are displayed in convenience stores which warn people with pacemakers about the fact that microwave ovens and other electronic equipment or equipment using radiated energy are present. Furthermore, when people board airplanes, they are instructed not to use personal computers or other electronic devices at landing and take-off. The reason for this is that aircraft employ complex electronic and electrical circuitry. Interference provided from outside sources by personal computers or

electronic devices can cause catastrophic problems on airplanes.

In 1977, an article was published in the IEEE Symposium on EMC entitled *"Near-Field Electric Field Strength Levels Of EM Environments Applicable To Automotive Systems"*. See Exhibit "4" attached. The article cautioned "[a]s the automotive industry moves from mechanical hydraulic control systems to electronic control systems, the reliability of these systems becomes paramount from a safety standpoint. Although these electronic systems can provide economical fuel use, they open the Pandora's box of requiring electromagnetic compatibility (EMC) with the environment in which they operate. Shielding and filtering are well known ways of achieving EMC, but they do cost money. Reliable measurements are the key to knowing when one has achieved sufficient compatibility at a minimum cost." *Id.* at p. 336. This article is important because it cautions automobile manufacturers that the use of electronic systems in vehicles increases and augments the problems with electromagnetic compatibility and electromagnetic interference. As I stated in my expert report, a sharp increase in the number of sudden accelerations was experienced by users of Mercedes vehicles during the early 1980's which tapered off during the late 1980's. The reason for this is because electronic circuitry, as shown by the 1977 IEEE article referred to above, increasingly had been introduced into automobiles during this time period. These complaints indicate that shielding was not working, and that problems with electromagnetic interference existed.

A June 1978 article published in the *1984 SAE Handbook* entitled *"Electromagnetic Susceptibility Procedures for*

Vehicle Components Except Aircraft" was published by the Society of Automotive Engineers. See Exhibit "5" attached. This technical paper discussed industry standards to be used for grounding and shielding of electronic components. This paper demonstrates that the issue of proper shielding should have been addressed in the 1985 Mercedes Benz Mr. Baker was driving on the night of his accident.

In 1984 a paper was published in the *Society of Automotive Engineers Transactions* publication entitled *"Alternative Methodology for EMC Design to Achieve Interference Immunity for Electronic Instrumentation"*. See Exhibit "6" attached. The article stated that today's electronic instrumentation is almost completely dominated by the microprocessor. Most standard techniques used to protect against electromagnetic interference have been ineffective. This industry study presents a design method which allows immunity to higher levels of interference through the synergistic use of hardware and software. The study is significant because it describes details which can be used to minimize electromagnetic interference in electronic circuitry. This article shows that there has been a division of responsibility for EMI protection which leads to a piecemeal approach where very often certain EMC scenarios are over looked. In short, the paper describes the problem with the automotive industry in providing shielding for electromagnetic interference.

In 1985, the Chairman of the International Symposium on Electromagnetic Compatibility published his message to the symposium. The message stated that "As electronic devices and users proliferate, the issue of interference has escaped the normal controls upon it. As the

slogan indicates, EMC is a *universal goal.* Our problem child is well on its way to becoming a genuine delinquent." See Exhibit "6" attached. The message demonstrates that electromagnetic compatibility and electromagnetic interference are problems that have not been adequately taken care of by manufacturers of electronic components and circuitry. This can be said for the automobile industry as demonstrated by the 1984 SAE Transaction article entitled *Alternative Methodology For EMC Design To Achieve Interference Immunity For Electronic Instrumentation.* See Exhibit "7" attached. It also shows what I have described in my expert report: from the early 1980's to the late 1980's complaints of sudden accelerations proliferated. Before then, and after then, the complaints were rare. The reason for there being few or no complaints early on was the absence of complex electronics within automobiles. The reason for the diminished complaint rate on automobile models produced during the late 1980's is that problems producing sudden acceleration, including EMI were electromagnetic compatibility. In short, as electronic and electrical circuitry were introduced into automobile vehicles in the early to mid and later 1980's, Mercedes Benz failed to adequately protect its circuitry from producing malfunctions that result in sudden acceleration.

In fact, as late as 1988 the IEEE Symposium on EMC published an article detailing this very problem. The article was entitled *Analysis of Automotive Conducted Electrical Transients.* See Exhibit "8" attached. The article describes that the traditional way of insuring automotive electromagnetic compatibility has been through an iterative test and fix type of approach that consists of fixing

electromagnetic interference problems discovered during whole system testing. Before system integration, care is usually taken in order to reduce the likelihood of EMI problems. This is achieved through good EMC industry standard practices, as well as through components specifications such as Delco Electronics Engineering Specification #T2000. Nonetheless, several iterations may be required to assure system EMC, with the accompanying cost and schedule penalties. Scheduling for testing is becoming a more difficult problem to deal with. The increased demand for whole vehicle EMC testing has been largely due to the increase in the number of electronic/electrical components, and to the increase of automotive electrical/electronic system complexity. The article stated that components can be susceptible to one or more measurable transient wave form parameters such as peak voltage or current, rise and fall time, energy content, etc. In other words, one must know what transient parameters are critical for each component. This fact makes the selection of worst case wave forms device dependent, thus complicating the task and maybe increasing the number of wave forms to be injected into devices for conducted susceptibility testing. The article is instructive for the following reasons: it shows that there are different methods for testing components to be used in automobiles, and as automotive electronic/electrical systems proliferate, the need for testing and shielding becomes greater.

The Peer-reviewed articles referred to above, *i.e.*, Exhibits 1-8, are the sort reasonably relied on by engineers to form opinions regarding electromagnetic compatibility and electromagnetic interference and the

evolving industry standards and methodology for these areas of interest. Articles of this sort, help to establish the bases for the opinions I developed regarding the incident that occurred on May 27, 1992 involving Jerry Baker. The conclusions I reached were described in a letter I wrote on April 28, 1995, and the conclusions and opinions are as follows:

Keeler-Webb Associates, Consulting Engineers, were retained to review circumstances surrounding a single vehicle accident that occurred on May 27, 1992 at approximately 11:08 P.M. The subject accident occurred near the intersection of South Pope Street and West Saner Avenue, Dallas, Texas. Keeler-Webb Associates was requested to analyze the accident and to render an opinion concerning whether the mechanical integrity of the subject vehicle contributed to the cause of the subject accident, based upon our experience of similar occurrences and the circumstances surrounding this accident.

A copy of the Motor Vehicle Accident Report prepared by the City of Dallas Police Department was obtained and reviewed. The eye witness accounts of the accident, as outlined by the operator of the motor vehicle, were also reviewed. Other documentation, including past inspections of similar Mercedes Benz vehicles and National Highway Traffic Safety Administration Information concerning the number of sudden acceleration incidence involving Mercedes Benz vehicles, was also reviewed.

I report as follows:

1. A Mr. Jerry Baker of Dallas, Texas, was operating a 1985 Mercedes 380 SE, northbound on South Pope Street

in Dallas, Texas. While approaching the intersection with West Saner Avenue, the vehicle accelerated uncontrollably. The operator attempted to brake and steer the vehicle but control of the vehicle was lost. The subject vehicle struck a utility pole and a fence before coming to rest in the roadway.

2. Approximately two blocks prior to the subject accident, the operator of the motor vehicle had stopped at a store to make a purchase. Upon leaving the parking lot of the subject store and traveling a couple blocks, the sudden acceleration of the motor vehicle occurred.

3. At the time of the subject accident, the operator of the motor vehicle reports that he was traveling approximately 30 to 35 MPH when suddenly the vehicle begin to accelerate and gain speed.

4. Reportedly, the speed limit in the area of the subject accident is 35 MPH.

5. Reportedly, the subject vehicle is a 1985 Mercedes 380 SE, VIN #WD8CA32C2FA189061.

6. The subject vehicle has an engine that obtains fuel from a fuel injection system. The Fuel Injection System operates with the assistance of many monitored parameters, such as pressure sensors, temperature sensors, time sensors and various other controlled devices. These sensors are constantly monitoring data from the engine and the optimization point is the result in output where gas and air flow to the cylinders is optimally efficient without losing the desired performance.

The accelerator linkage is connected to the throttle body of the fuel injection system which gives direct input

to the desired speed of the engine. Additionally, the accelerator linkage is connected to the transmission for input purposes, resulting in gear shifting output sequences. When the engine load changes, the engine will operate to maintain the proper engine speed. Simultaneously with all the changes within the air and fuel control system, the transmission is also shifting. Many of these changes interact with each other, and there is a brief transition time for each variable to stabilize at a new condition. Some of these variables will momentarily over shoot before recovering to their final stabilized condition. During these transition periods, extreme fluid pressure or the sticking of an individual component in the abnormal position are distinct possibilities for any complex system. These conditions could lead to high engine air flow and correspondingly high fuel flow.

7. Another component tied to the main throttle control on the throttle linkage of the fuel injection system is the cruise control system. The cruise control unit is activated when the cruise control power switch is in the "on" position. Electrical circuitry provides power and controls for the cruise control mechanism tied to the accelerator. The Cruise Control Electronic Unit that controls the input and output sequences for the cruise control unit, is comprised of complex electrical circuitry. This type of electrical circuitry, as demonstrated by the peer-reviewed articles recited above, has been known to be affected by Electromagnetic Interference (EMI). Electromagnetic Interference is present wherever electronics are located. Electromagnetic Energy tends to increase in urban areas. Integrated electrical circuitry in computers and circuit

boards involved in controlling components such as airplanes, automobiles, heating ventilating control systems, computer network control systems, etc. have been known to be affected by EMI. The presence of EMI can cause the erratic and abnormal behavior of the circuitry and the items that are being controlled by the circuitry. To avoid these consequences that can be produced by EMI, proper shielding of electrical equipment needs to be installed.

EMI can affect the cruise control system on an automobile and produce strange and erratic behavior such as sudden and uncontrollable acceleration of the vehicle.

8. A review of records obtained from the National Highway Traffic and Safety Administration ("NHTSA") reveals that Mercedes Benz automobiles had experienced an abnormal number of sudden acceleration during various model years during the mid 1980's. Prior to this date, sudden accelerations were much lower and in latter years, the sudden acceleration rates also dropped. Statistically, for the noticeable increase in the reports of sudden acceleration incidents during the mid 1980's, a reason would exist for this phenomena. This reason can be traced to various aspects of the manufacturer and design of the fuel injection system and cruise control unit. The sudden drop in reports of incidence of sudden acceleration would indicate that another change took place, such as a correction of the problem. The statistical information recorded by NHTSA, a U.S. government entity regarding complaints of sudden acceleration is reliable and is of the sort that is reasonably relied upon by engineers in formulating opinions about vehicle safety. Since the complaints recorded by the NHTSA statistics database or statistics reports are about sudden acceleration, the incidents

reported are substantially similar to the event Mr. Baker described happening, to him.

Based upon our review, of the above industry standard publications, governmental statistical reports, technical practice manuals, coupled with observations made during our investigation applying the accepted electronic engineering methodologies and practices, it is my engineering opinion based on my training, experience and knowledge in the field of automobile accident investigations and my research and experience involving sudden acceleration complaints that to a reasonable degree of scientific and engineering probability, the subject vehicle suffered an electrical or mechanical failure causing a rapid acceleration of the vehicle. This failure, a condition resulting in a situation that was not intended, to a reasonable degree of scientific certainty caused a large quantity of fuel and air to be injected into the cylinders of the motor. It is my opinion that this type of failure is of an intermittent nature that can not be foreseen by the operator of the motor vehicle. Examination of the vehicle today may result in no apparent defects or failures, but a failure may occur and then disappear at a given instant because of many changing variables.

The exact determination of intermittent failure, as such, requires a large amount of technical/scientific manpower, facilities, tooling and expenses for testing automobiles that the manufacturer has the capability to explore. Also, a detailed review of product drawings, hardware/software in a comprehensive failure cause and effect analysis may be needed to guide such a test program. Many of these necessary documents are available

only from the manufacturer's files. Even so, the information I have is sufficient to reach the conclusion and opinions I developed.

The nature of this failure is one that the manufacturer has resources and opportunity to determine the exact defect prior to distribution through its quality control department, failure analysis department and engineering department.

In summary, it is my engineering opinion to a reasonable degree of scientific certainty that an intermittent failure occurred in the subject 1985 Mercedes 380 SE, and that such failure caused this accident. It is my engineering opinion that this electrical/mechanical failure occurred in the fuel injection system or the cruise control unit. It is my opinion that this failure was to a reasonable degree of scientific certainty related to the cruise control unit and EMI.

Had proper shielding and design of the cruise control unit been implemented by the manufacturer, it is my engineering opinion that to a reasonable degree of scientific certainty this sudden acceleration and many of the other sudden accelerations that have occurred throughout this country and the world, would not have occurred. Had this sudden acceleration not occurred in the subject automobile, this accident would not have occurred.

The above stated opinions are supported by the following:

1. The circumstances surrounding the accident support a vehicle that suddenly accelerated. My investigation results were compiled by applying standard engineering

methodologies and practices including human factors considerations, the mechanical and electrical aspects of this automobile, as well as literature on the subject.

2. This accident was similar to many (over 30) other accidents that Keeler-Webb Associates have investigated where a sudden acceleration phenomena has occurred.

3. Governmental agency reports of sudden acceleration involving similar vehicles had a sharp rise during models of the mid 1980's and had a sharp drop off during that decade.

4. Peer-reviewed literature describing EMI associated problems supporting these opinions.

5. The methods I used to formulate the opinions I have are scientifically valid.

The opinions that I have detailed above are based upon sound engineering principles and basic knowledge involving the introduction of electronic and electrical circuitry into automobiles, and the consequent problem with electromagnetic interference. It is my opinion that transient electromagnetic interference existed around Jerry Baker's automobile at about the time his automobile began to suddenly and unintentionally accelerate. There has been general acceptance among the engineering community and in industry standard publications regarding the problems associated with electromagnetic interference in electronic and electrical circuitry. The generally accepted and scientifically established fact is that electromagnetic interference causes problems to electronic circuitry, and it is my opinion that the problems were not adequately dealt with by Mercedes Benz in the 1985 time-

frame. I know this based upon the number of complaints of sudden acceleration that have been reported to governmental entities by consumers which occurred with the introduction of complex electronics in automobiles as my research into the reports has shown. Electromagnetic interference literature has been subject to peer review and the articles I have described above are examples of that peer review process. The articles I have cited as examples show that electromagnetic interference is a tremendous problem that must be delt with on a design basis by those who manufacture electronics and electronic apparatuses contained in systems, such as automobiles. The reasoning that I have used is scientifically valid as reflected by the history of the introduction of electronical and electronic circuitry into automobiles. In other words, before the early 1980's, complex electronic circuitry was essentially absent from the functioning parts of an automobile. In the early 1980's through the late 1980's and even today, more and more complex electronic circuitry and computer systems were added into automobiles. With the consequent introduction of this type of circuitry into automobiles comes the need for greater shielding against electromagnetic interference. Based upon the number of reported and recorded complaints of sudden acceleration of Mercedes vehicles from the early 1980's to the late 1980's, it can be seen that a problem did exist which resulted in numerous sudden acceleration incidents, and this problem, in my opinion, is related to the introduction of complex electronic circuitry controlling the cruise control and fuel injection systems and EMI which causes malfunctions of this type of circuitry.

In my testimony during the *Recometa* case, I was asked about the conclusions drawn from NHTSA tests on Mercedes vehicles. I disagree with the NHTSA observation that electromagnetic interference, radio frequency interference and high-voltage discharges produced no failure rates of any relevance to the occurrence of SAI. The same report conceded that electromagnetic energy could artificially induce malfunctions in certain systems in Mercedes vehicles. Given the limited sampling of vehicles tested by NHTSA and the fact that their results showed that electromagnetic energy can cause malfunctions within the system, the findings are relevant and significant. By way of illustration, Exhibit "3", *Electromagnetic Compatibility of Cardiac Pacemakers*, showed that electromagnetic energy caused system failure in some, but not all of the pacemakers tested. Just because some pacemakers were unaffected doesn't mean that all pacemakers are problem free. Similarly, just because only some systems in Mercedes vehicles were affected when subjected to electromagnetic energy doesn't mean the vehicle is without problems. Evidence of the problems exists by virtue of the complaints others have made about sudden acceleration.

All the opinions stated in this Declaration are based upon a reasonable degree of scientific and engineering probability. I considered other caused for the sudden acceleration event described by Mr. Baker, and the conclusions I reached were the most likely of those causes I considered.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED this 11th day of October, 1995.

/s/ James P. McCann
JAMES P. McCANN, P.E.

Center for Auto Safety
2001 S Street N.W. Suite 410
Washington, D.C. 20009
(202) 328-7700

June 8, 1987

Diane Steed, Administrator
National Highway Traffic
Safety Administration
400 Seventh St SW
Washington DC 20590

PETITION FOR EXPANDED DEFECT INVESTIGATION AND RECALL

Dear Administrator Steed:

Since Last January, when the National Highway Traffic Safety Administration (NHTSA) closed its investigation of certain 1986 model Mercedes-Benz cars that suddenly accelerate after shifts out of Park because no "defect trend" was discovered, reports of "runaway Mercedes" incidents received by the Center for Auto Safety (CAS) have increased seven-fold, from 5 reports in January, to 24 reports as of two weeks ago when CAS' first petitioned NHTSA about the problem, to 36 reports today. Together with separate reports received by NHTSA, there are 42 known "runaway Mercedes" reports, resulting in at least 31 accidents, 20 injuries and 1 death.

In just the past two weeks since CAS' May 22, 1987, petition calling on NHTSA to reopen and expand its Mercedes investigation, a dozen new reports have been received, including complaints on 1987 models not covered by our original petition, as well as on Mercedes' larger 1986 models, the 420SEL and the 560SEL.

The surge of recent "runaway Mercedes" reports to CAS demonstrates that sudden acceleration now affects Mercedes' entire line of recent model, gasoline-engine cars with automatic transmission. Moreover, these latest reports to CAS sharply contradict Mercedes' "driver error" excuse for sudden acceleration. Among the new reports:

* William N. Ostapenko of McLean, VA, told CAS about his wife's April 2, 1987, accident when their 1986 Mercedes 420SEL accelerated uncontrollably after being started in park. Though the car travelled only about 40 feet in a Bloomingdales parking lot, it shoved two parked vehicles over a sidewalk and across a two-lane road, forcing one of them into a third parked car.

  Mr. Ostapenko, *an engineer and former NHTSA official,* told CAS his wife is certain she was braking and not hitting the accelerator by mistake because her daughter, sitting in the front passenger seat, saw Mrs. Ostapenko's foot on the brake. Mr. and Mrs. Ostapenko contacted CAS after NHTSA reportedly showed no interest in the accident and Mercedes brushed it off following a perfunctory inspection.

* After a restaurant valet parker brought his car out and parked it with the engine running, Anthonys Spagnol of Bethel Park PA, got into his 1986 Mercedes 190E, fastened his seat belt, and asked his wife seated next to him if it was "OK to go." When she said yes, he shifted into drive and stepped on the accelerator. The car suddenly accelerated, and the brakes were not effective in slowing

the car down. Mr. Spagnol steered through the parking lot and onto a busy street. When Mr. Spagnol turned the wheel sharply toward a vacant lot, the car flipped completely over and stopped.

Both driver and passenger were injured. According to Mr. Spagnol's letter to CAS, the restaurant valet manager **"said he saw my brake lights on which indicated that I [was] braking and trying to stop the car before the crash."**

* Edna May Learned of St. Helena CA, started her 1986 Mercedes 300E in park, with her foot on the brake and the emergency brake on as well. She shifted to drive, keeping her foot on the brake, and released the emergency brake. At that point she heard a "thumping noise," and the car took off like a rocket. Ms. Learned steered into a clump of rocks, stopping the car.

  When Ms. Learned immediately restarted her 300E, the car idled normally and the brakes were fine. But Ms. Learned is positive she did not hit the gas by mistake; **her friend sitting in the front passenger seat saw the driver's foot on the brake.**

* CAS reported in its May 22, 1987, petition that Ms. Lorie Epstein of New York City had phoned us about a sudden acceleration accident in her 1986 Mercedes 300E. Since our petition, Ms. Epstein has reported that in her accident, her car first took off in a parking garage and slammed into a fence. Then, when she shifted into drive to move the car, it sped away again, striking a pole. According to Ms. Epstein, after she got out of the

> car, **several witnesses saw the now driverless 300E's wheels continue to spin after the impact.** Mercedes reportedly blamed the accident on a stuck floormat, but subsequently replaced the damaged car.

In addition to those 1986 300E reports obtained separately by NHTSA during its prior investigation, CAS has now received a total of 36 reports of sudden acceleration in 1984-87 Mercedes-Benz gas-engine cars, resulting in at least [Illegible] accidents, 18 injuries and one death. Accidents in which witnesses saw brake lights, accidents in which passengers saw the driver's foot on the brake, accidents in which cars' wheels kept spinning after impact and after the driver had exited, are strikingly at odds with Mercedes-Benz' determined effort to blame a dangerous defect on defective drivers. Furthermore, the sheer number of steadily mounting accident reports demonstrates that NHTSA's earlier conclusion that no sudden acceleration "defect trend" existed in Mercedes car was clearly unfounded.

Our May 22, 1987, petition sought a formal defect investigation of Mercedes 1984-85 190E, 1986 300E, 1985 380SL, and 1985 500SEL/SEC cars with automatic transmission. Since then, we have also gotten "runaway car" reports on the 1986 190E, 1986 420SEL, 1986 560SEL, 1987 300E and 1987 260E. Based on these newest reports[1], the Center for Auto Safety hereby petitions NHTSA to open a formal investigation into all 1984-87 Mercedes-Benz cars

[1] All additional reports received by CAS are enclosed.

equipped with gasoline engines and automatic transmission, and to order the recall of all vehicles found to contain a safety-related defect.

Sincerely,

/s/ Dan Howell
Dan Howell
Vehicle Safety Staff

/s/ Jonathan Hart
Jonathan Hart
Vehicle Safety Intern

A. P. Spagnol
7015 Dumbarton Place
Bethel Park, Pa. 15102

The Center For Auto Safety
2001 S Street, North West
Suite 410
Washington, D. C. 20009

May 30, 1987

RE: Sudden Acceleration Accident
1986 Mercedes 190 E
January 9, 1987
Anthonys P and Agnes A Spagnol

Dear Sir:

I wish to report for the record an accident on January 9, 1987, which resulted from the sudden and unexpected acceleration of a 1986 Mercedes 190 E with automatic transmission.

At about 8:40 P.M., after having dinner at Louis Tambellini's Restaurant on Route 51 in Pittsburgh, Pennsylvania, the valet retrieved my car from the parking lot, parked the car and with the shift gear in the "Park" position, opened the door for my wife Agnes. I got in the car, fastened my seat belt and asked my wife whether its "OK to go" – which is my usual custom before we start forward. She said it was "OK" and fastened her seat belt. The weather was clear and the road dry.

I moved the gear shift to the "Drive" position and stepped on the accelerator. The gas pedal was suddenly drawn to the floor like a magnet had drawn it. I could not control the speed of the car although I pressed the brake pedal to try to stop it. We were horrified and frightened.

Because of the confined area, i.e., leaving the parking lot, I was worried about hitting someone or another car at a high rate of speed. The car bounced over a curb at which time my head hit the top of the roof of the car and we proceeded toward an incoming lane of cars. We were in the out bound lane at the intersection of Route 51 and Bausman Street. We were lucky. We had the green light which prevented a certain multi-car disaster at a very busy intersection.

To avoid the possible catastrophe of striking a number of cars in the incoming lane and possibly killing or seriously injuring a number of people, I turned the steering wheel sharply to the right toward a vacant lot and a building, knowing that we may be injured but we would avoid injury to others. I had no time to really think of any other option because everything happened so fast.

The car immediately made a complete turn, flipped over with the drivers side and the roof striking the asphalt road and ending up right on its wheels. We crashed about 400 feet from our starting point.

We survived. I immediately asked my wife if she was OK. She said she was having trouble breathing and complained about chest pains. I got out of the car and walked around to her side of the car to open the door to further check her condition. She appeared shaken and had trouble breathing.

Within minutes, the Pittsburgh para medics and police officers Hoffman and Jones of the City of Pittsburgh were on the scene. The valet manager had called the medics and police when he saw the car go out of control and overturn. He said he saw my back brake lights on which

indicated that I braking and trying to stop the car before the crash. Also one of the police officers said he saw spin marks on the asphalt road. This was the result of the rear wheel on the driver's side spinning when it hit the road. The marks of the spin are clearly visible on the cast aluminum face of the wheel and tire. We have taken pictures of the car and in particular the wheel for future reference. My wife and I were taken to Mercy Hospital for medical treatment after the accident.

My wife suffered a severe break of her sternum, a bruised heart and fractured teeth caps. I suffered a head bruise and a severe whip lash type of neck injury. We thank God we didn't injure or kill others and that we were not killed. My wife was hospitalized for a week to monitor her bruised heart and other body systems. I was released late on January 9 after an extensive examination and x rays of my higher vertebra. To this date we have not fully recovered.

The morning following the accident, January 10, I called Mr. John T. Marchieski, Assistant Manager of Wetzel Motor Works, the Mercedes dealer from whom I bought the car in June, 1986. I informed Mr. Marchieski of the accident and the sudden acceleration of the car. He was sympathetic but noncommittal about the mechanical defect of the car. I haven't heard from Wetzel Motors or Mercedes since that last call except to talk to Mr. Marchieski when I picked up the car on January 21, 1987 from the Wetzel lot where it was towed after the accident. The car was a total loss.

I have been driving for 50 years, since I was about 15, including limited driving of an Army jeep in Europe

during WWII when I was with the 82nd Airborne Division. I have had only one minor fender bender ($359.00 damage) during this period in which I have driven an average of approximately 15,000 miles per year which included most makes of cars.

The callousness and indifference of the auto companies and their dealers never ceases to amaze me, even though I have been aware of this attitude of theirs for years. It's one industry that can treat its customers with indifference.

If you should need additional information please write or call me at (412) 835-0565

I thank you in advance for your consideration.

Very truly yours,

/s/ A. P. Spagnol
A. P. Spagnol

CC: P. Christian Hague, Esq.

Call taken 5-28-87
DH

William N Ostapenko
1511 Laburnum St
McClean VA 22101
536-5997

1986 Mercedes 420 SEL
Sudden Acceleration
Accident 4-2-87

What Happened: Wife drove to Bloomingdale's at Tyson's Corner, VA, with daughter. Wife is age 68, daughter age 40. Car was parked in parking lot with engine off. Wife and daughter get in, wife starts car in park, it lurches forward, crosses a parking divider, hits a new Mercedes 560SEL and a Toyota 4x4 – actually wedges between them and shoves both these parked vehicles across a street that divides sections of the parking lot (distance travelled before impact was about 40 feet). The accelerating 420SEL pushes these TWO parked cars over the sidewalk and across a two-lane road, then one of the vehicles being pushed strikes another parked vehicle – so altogether, 4 vehicles involved.

No PI; $6K PD to 420, airbag did not employ (420 did not have an actual frontal impact with the vehicles it struck).

Caller, who is an engineer and former NHTSA director of motor vehicle in use safety standards, is convinced that his wife was was [sic] braking and did not hit the accelerator by mistake. He says she is positive that her foot was on the brake and that their daughter, the front seat passenger, observed the driver's foot on the brake. The investigating police officer reportedly said that skid

marks at the scene looked like the drive wheels digging in after impact.

Caller has contacted Art Neal at NHTSA and John Ranger, Mercedes' head of US customer services. Ranger came out with Andy Kameeban (sp?) to inspect the 420, no problem found. NHTSA told caller the previous investigation of 300E's turned out to be people hitting the gas pedal. Apparently Mercedes' investigation consisted primarily of a stall test.

Will send written report when available.

CAS arranged for caller to have his vehicle examined by Bill Rosenbluth.

Wife has had no prior accident in 46 years of driving.

Dorothea Pilkenton 2205-23rd Avenue

Sacramento, CAlif 95822
(916) 455-0253
May 25, 1987

Center of Auto Safety
2001 S Street, N.W.
Washington, D.C. 20009

Attention: Dan Howell

Dear Mr. Howell. I am writing to you at the suggestion of Mike Luery, CALL 3 of KCRA-TV, Channel 3, Sacramento.

On Sept. 25, 1986 I purchased a 1984 190E 4-door 2.3 Mercedes Benz and drove it off the lot at Von Housen Motors, Inc. 1810 Howe Avenue, Sacramento, CA 95825. (916) 924-8000. It had a two year warranty and I was the second owner. The car had previously been sold to a Sacramento person by Von Housen. ENGINE or I.D. number is: WDBDA-24A7EA104398.

On March 6, 1986 at approximately noon (12 o'clock) I put my Mercedes Benz 190E, 1984 into reverse on the parking lot at 2920 Arden Way, Sacramento. As I gently put my foot on the accelerator it shot like a bullet out of a gun at a terrifying rate of speed. I pushed on the foot brake as hard as I could but the car was accelerating at a frightning [sic] speed toward a a [sic] building and a concrete wall. I pulled on the steering wheel and made a "L" turn. Still in reverse and still accelerating the Mercedes crashed into a concrete wall. Just before the impact, I jerked on the steering wheel and the right rear slammed into the wall.

I had my seat belt on and with me still in the driver's seat it [the seat] was torn loose from its bolts on the floor and slammed into the telescoped rear section of the vehicle.

Damage was estimated [by Van Housen] to be a totalled car at $14,000. The damage by an appraiser from my insurance company: Liberty Mutual Ins. Company, 2233 Watt Avenue, Sacramento ~~96365~~ was estimated at $12,400. minus my $200. deductible. P.O. Box 254678, Sacramento, CA 95865

I was taken by ambulance to Sutter General Hospital, 2801 L St., Sacramento, CA to the emergency unit for examination and X-rays. I remained in the hospital for March 6, 7 and until noon March 8.

Thank you for your interest.

Cordially,

/s/ Dorothea Pilkenton
Dorothea Pilkenton

4644 Grindingstone Dr.
Raleigh, NC 27604
March 2, 1987

Jeff Stevenson
Mercedes Service Director
Leith, Incorporated
P. O. Box 40110
Raleigh, NC 27629

Dear Jeff:

I have spoken with both David and Dick regarding the sudden acceleration problem I experienced with my 300E on Thursday. I was involved in an accident on February 16, 1987. By the Grace of God, no one was injured. However there was considerable damage to the automobile.

I feel led to document this mishap in writing because other people may have the same problem I did – attempting to control a runaway car.

I was travelling from my house in Walden Woods and turned onto Millbrook Road heading toward US #1, North when it happened. As we rounded the right turn near Hargrove Road, the car suddenly accelerated and I lost control. Jeff, it seemed like the car had a mind of its own. I couldn't stop the car! It fish-tailed convulsively out of control, gaining speed as it whipped us around in circles on *dry* pavement. We finally crashed into the curbing at Hargrove and Millbrook Road and came to a stop on Hargrove.

I'm reporting this because I want engineers to investigate the acceleration problem, the loss of steering and control,

and the zero braking capacity. The 300E is at Auto Alignment, 2821 North Blvd., Raleigh. I have asked them to hold all repairs until the safety engineer arrives.

I also want you to tell me if there have been any reports of similar problems with sudden acceleration on the 300E's. If there are safety concerns, you *should* notify other 300E owners of these problems.

Just for the record, I'm not over-reacting! I have reported acceleration problems to Leith twice before. Your mechanics have reported that they could find nothing wrong. The 300E has a serious acceleration problem. I know what I experienced to be true. I'm a good driver, not perfect, but conscientious and honest. The truth is, you've got a beautiful car with a serious acceleration problem.

I urge you to investigate my mishap IMMEDIATELY. I shall contact you on March 2 to begin our investigation. Please believe in my sincerity, I don't want anyone else to go through what my family and I experienced. We were fortunate – someone else may not be as fortunate the next time a 300E goes out of control.

I request your immediate reply.

Sincerely,

William H. Holton, Jr.

cc: President, Leith, Inc.
Auto Alignment

LOS ANGELES TIMES FRIDAY, JULY 15, 1994

PAGE
3 THE GOODS

Can Stray Signals Affect Electronics in Car Systems?

ILLEGIBLE

By RALPH VARTABEDIAN
TIMES STAFF WRITER

As the electronic components of automobiles grew throughout the 1980's, reports of unexplained sudden acceleration multiplied rapidly.

Drivers said their car engines would suddenly surge and the car would lunge forward at high speed without a foot on the accelerator. There were reports of serious injuries.

Auto makers concluded the problem resulted from confusion – when drivers would push on the accelerator thinking it was the brake. Nonetheless, the reports of sudden acceleration on specific models grew from dozens to hundreds. Audi sales were seriously hurt by the reports.

The National Highway Traffic Safety Administration conducted eight formal investigations into different models and concluded in March, 1989, that there was no evidence a defect could cause sudden acceleration, agency spokesman Tim Hurd said.

But the reports continue, and some critics still believe sudden acceleration is caused by defects in the electronic systems and computers that control modern cars' engines, cruise controls and transmissions. And some critics continue to press an offensive.

Paul Roupinian of Rancho Palos Verdes began his fight with Nissan in 1987 over what he regards as a sudden-acceleration incident involving his 300ZX.

Roupinian has filed three petitions with the safety administration, all denied, and has filed a suit against Nissan in Los Angeles Superior Court. Earlier this year, Roupinian testified before Congress on the issue.

Nissan officials say the company examined Roupinian's car and found no defects.

The Center for Auto Safety, a Washington, D.C. consumer group, continues to receive reports and rejects the explanation that all sudden acceleration results from driver error.

The center believes the safety administration has failed to fully investigate theories that complex electronic systems on cars are susceptible to acting in unintended ways.

They cite the concern of airlines that stray electronic signals could disrupt flight and communications systems. Airlines require passengers to shut off electronic gear at takeoff and landing. The U.S. Department of Justice joined a private whistleblower suit last month charging that General Electric made false statements to the government when it certified its aircraft engines were not vulnerable to electronic interference.

Roupinian's petition and lawsuit allege Nissan electronics are vulnerable to stray electronic signals as well.

The sudden-acceleration claims did prompt auto makers to put shift locks on new cars. These require drivers to put their foot on the brake before shifting out of park. That has sharply reduced the number of claims, but not eliminated them. Millions of existing cars have no shift locks, leaving the issue open.

Vartabedian cannot answer mail personally but will attempt to respond in this column to automotive questions of general interest. Do not telephone. Write to Your Wheels, 1875 I St. N.W. #1100, Washington, D.C. 20006.